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I.

DEFINITION OF THE PROBLEM

A. SCOPE OF INQUIRY

The general problem of whether and to what extent the activities of the government of one nation-state should be held immune from the judicial authority and processes of another state in connection with private suits has been a recurrent and troublesome one within the whole community during the last century. The problem is presently unresolved on a comprehensive scale.

The difficulty and the importance acquired by the problem can be attributed mainly to the conflicting demands reflected in two momentous social trends which have advanced in the world during the century and which have collided in reference to claims pertaining to the doctrine of sovereign immunity. One of these trends, the general growth of respect for the rule of law, which is characterized by concomitant demands that governments conduct their affairs in a manner which accords due regard to the private rights of individuals and that governments be charged with accountability before the law for damages inflicted by them to private claimants in derogation of the latters' rights, can be viewed as an effort to develop ideals of respon-

sible exercise of governmental authority.

The other trend, the expansion of governmental participation in commercial enterprise and the commitment of a significant number of countries to large-scale state trading, has resulted in strong countervailing demands reflecting desire on part of some countries to protect their state enterprises from foreign interference or to secure for them a competitive advantage. Such demands have come to be associated primarily, though not exclusively, with the vast state trading systems of the communist states.

Although the general problem thus posed presents for reconciliation some mutually antagonistic sets of demands, there is basis for belief that the problem is nevertheless capable of being resolved satisfactorily in time through efforts of major participants to reassess their presently disparate interest identifications and policy objectives which bear on sovereign immunity issues.

It is therefore the purpose of this study to examine in relevant historical and practical contexts the divergent interests and policy goals which are involved in sovereign immunity claims, to appraise in those contexts the rationality and consequentiality of such claims, and to identify the common interests and objectives of the major participants which may be maximized by them toward the end of achieving effective agreement among states in regard to sovereign immunity policies.

B. PRACTICAL IMPORTANCE OF THE PROBLEM

Mere reference to the voluminous table of cases contained in one of the more comprehensive surveys of international decisions concerning sovereign immunity would serve to fairly illustrate the immense proportions which the problem of sovereign immunity has assumed in the world community and the breadth of the concern which it has generated.[1]

The bulk of the decisions pertain to the immunities of state-owned or state-controlled organizations, instrumentalities or property connected with activities which can be understood to have some degree of commercial character. Although the sovereign immunity issues which the past decisions have involved have thus far defied attempts to generally resolve them, state participation in international commerce is increasing. The volume of international trade carried on by the established state trading countries, particularly the Soviet Bloc countries, has continually grown during the past two decades, and there can be observed to be trends toward expansion of trade relations between the private trading systems of the West and the state trading systems of the East. The likelihood of continued expansion of East-West trade relations seems practically assured by indications of increased cooperation and interdependence in other matters of common concern to the East and the West. Moreover, new instances of nationalization of private enterprises on part of less developed countries are currently reported with considerable frequency. Forecasts for intensifi-

cation of trading contracts between private traders and state traders are inescapable and lead logically to projections of increased opportunities for sovereign immunity conflicts to arise in the future.

Even apart from other aspects of international commerce, the likelihood of increasingly frequent sovereign immunity conflicts arising from maritime contacts alone is great. A large proportion of sovereign immunity controversies in the past has been concerned with the immunities of governments' commercial vessels. Such controversies have arisen not only in respect to claims arising out of operations of the vessels themselves, but they have frequently arisen from attempts to attach vessels in order to vest jurisdiction for the prosecution of suits on unrelated claims against the vessels' governmental owners, or as security for the payment of such claims. Controversies of both types seem likely to increase commensurately with increasing numbers of government-owned vessels participating in international commerce.

Furthermore, continually increasing requirements of populations to obtain resources from the sea combine with advances in ocean science and technology to give assurance that increasing numbers of government-owned vessels will be engaged in commercial fishing and mineral extraction activities in the future. This will also increase the possibility of government-owned commercial vessels entering the territories of foreign states where they might be subjected to the prosecution of private claims.

In short, governmental participation in international

commercial transactions, and governmental operation of vessels for commercial purposes, both prolific sources of sovereign immunity conflicts in the past, promise to be of even greater importance in this respect in the future. This points to a compelling need to resolve the problem of sovereign immunity on a comprehensive global scale at an early date.

C. PRINCIPAL ISSUES

1. Central Legal Policy Issue: Governmental Accountability Vs. Protection of Governmental Activities

One concept of the doctrine of sovereign immunity which has been widely followed in the international community is that the government of one state has virtually absolute immunity from suit without its consent in the courts of another state. This concept, descriptively referred to as the "absolute concept" of sovereign immunity, might have been the predominant norm of the world community a century ago,[2] and it possibly still expresses the international practices of a majority of states.[3] The most rational justifications which have been advanced for it have been the alleged need of states to protect governmental functions from private and foreign interference on a mutual basis and the desire to avoid foreign relations friction.

The absolute concept of sovereign immunity has been qualified in a significant number of states during the past century, however, principally in most Western European countries and more recently in the United States. This has been done by

the adoption of versions of the so-called "restrictive concept" of sovereign immunity whereby immunity is denied to foreign governments in some important classes of civil suits. The classes of cases in which immunity is thus withheld can be said with considerable generalization to comprise suits by private claimants for damages attributable to foreign governments' acts which are of a substantially commercial character.[4] In the states where the restrictive concept has been followed it was adopted largely as an answer to juridical complications which have been entailed by the evolution of state trading,[5] and an important consequence of its adoption is that immunity can be denied almost categorically in respect to private claims arising from state trading transactions.

In view of this, it is hardly surprising to find that the restrictive concept has been most strongly resisted, and the absolute concept most strongly defended, by states which engage extensively in state trading, particularly the Soviet Union and the Eastern European Communist Bloc countries.[6] Irrespective of cold war implications which have given impetus to the Western trend toward restrictive immunity policies and which even now serve to help perpetuate a division of views,[7] the trend toward the restrictive concept is recognized as being fundamentally grounded upon concern for private persons who suffer injury as result of wrongful governmental action.[8]

Contemporary social policy in both the West and the East would tend to support popular expectations that governments be required to act responsibly toward individuals and, failing this, that they be held accountable in most matters before

judicial institutions. Trends toward the permissibility of suits against governments in their domestic courts operate to bolster expectations that the domestic courts also provide forums for adjudication of suits against foreign governments. From the Western point of view, these expectations are further strengthened in suits arising from state trading transactions, for in such cases these claims can be reinforced with a claim pointing to the essential fairness of treating governmental traders equally before the law with the private Western traders with which the former have elected to compete in world commerce.

It is a curious fact, however, that in a number of states immunity is still granted to foreign governmental defendants as to classes of claims upon which the respective forum governments would themselves be amenable in their own courts. This would normally be the case in the United Kingdom for example,[9] or in the Soviet Union,[10] and it appears that this sometimes still results as an aberration in the United States.[11] Though it might be amply rationalized on other substantial grounds, such a result would not appear to be readily defensible on grounds of sound public policy.

2. Disparate Policy Objectives of Participants

It can be observed that an East-West polarization of views exists in regard to sovereign immunity policies and that there are significant cold war implications of the problem. Those implications pervade all aspects of sovereign immunity in the international arena, and they may be of crucial impor-

tance to resolving the problem on a general scale.

Deeply involved in the sovereign immunity problem is an East-West contest between state enterprise and private enterprise. The state trading systems of the Soviet Bloc countries and the private trading systems of the Western states are both indispensable bases of national power of their exponents. If the two systems are to coexist in peaceful competition, then juridical equality between the two would seem to be necessary.

In the first place, there appears to be no rational basis for differentiating between the risks and liabilities to which the enterprises of the respective systems should be subjected upon entering into commercial transactions for gain. Although it can be claimed that it makes a difference if the anticipated gain would benefit a whole public rather than a mere few individuals, there is fundamentally a functional identity between the organs of trade in both the private trading and state trading systems. Nor does there appear to be rational basis for differentiating between the moral responsibilities of competing enterprises to compensate for injuries which they inflict upon private persons in the course of their activities.

Furthermore, the maintenace of competitive equality may be essential to the fact of continued coexistence of the state and private enterprise systems.[12] State trading has some inherent competitive advantages over private trading in that the former can be systematized by a nation to provide its trading organs with greater bargaining power, greater flexibility, and virtual freedom from interference by domestic interests.[13] The creation of additional advantages, such as immunity from

suit, may make it even more difficult for private traders to compete.[14]

It is axiomatic that private trade is the foundation of the Western economic system and that the Western nations have an urgent need to protect it from the competing system. This reasoning has clearly motivated the U.S. State Department to adopt the restrictive concept as its normal policy.[15] It is equally obvious that the Soviet Bloc states have an interest in preserving their standing to claim judicial immunity for their commercial organs and property in order to protect the instruments of their system of foreign trade. It would seem to be advantageous from the Soviet point of view for it to maintain that position so long as its trade objectives are inseparably connected with its political, military, and ideological cold war objectives,[16] but any such advantage might prove to be illusory if and when the Soviet Union commits itself to competing in international trade primarily for economic gain.

3. Nationalistic Character of the Law

There are no international judicial forums having competence to adjudicate suits by private plaintiffs,[17] and there has been no effective general treaty practice concerning the immunities of national governments and their property and vessels from the exercise of foreign judicial jurisdiction in civil suits. Instead, the law of sovereign immunity as it has operated in the international sphere has been predominantly effected by unilateral policy pronouncements of national

decision-makers, mainly judges and foreign relations officials, often deciding on an ad hoc basis.

The subject is estimated to have produced a greater volume of municipal law decisions than any other subject of international legal concern.[18] The frequency with which international sovereign immunity claims have arisen in national courts, together with the tendency of decision-makers to resolve them on the basis of national comparisons rather than by international criteria,[19] helps to account for what appears on the whole to be an essentially nationalistic approach to the formulation of sovereign immunity policies.

The problem of the judicial immunities to be accorded to foreign governments can rationally be understood to constitute merely the external side of a fundamental policy issue which has arisen within both the internal and external arenas of states, i.e., whether and to what extent any government, domestic or foreign, should be permitted to avoid judicial accountability to private claimants for harm attributable to its activities.

The policies to be adopted by a state to resolve the problem in its internal arena are shaped entirely by the local social, political, and economic value factors which are brought to bear on decision-makers through internal political processes. Examples of such local factors include the prevalent local ideals concerning individual rights and governmental responsibility, public fiscal considerations, and demands for protection of local private interests. These factors operate also in respect to the external side of a state's sovereign immunity

policies, but there the matter is further complicated by the addition of foreign relations interests and international legal policy considerations. Because clear and rational international legal policy pronouncements concerning sovereign immunity have heretofore been lacking, states have been free to devise their own external immunity policies in accordance with their individual local value and foreign relations perspectives.

National decision-makers have been hard put to accommodate the important interests involved in sovereign immunity controversies concerning foreign governments. Within most states, demands for individual justice and governmental accountability have combined with the political and economic implications of the conflict between state enterprise and private enterprise to form strong bases for objection to the application of the absolute concept of sovereign immunity.[20] On the other hand, demands of state traders for the protection of their instruments of trade, backed by tacit threat of economic, political, or legal retaliation, are considerations which are too substantial to be ignored by even the most idealistic states in view of the major role now played by state trading countries in every phase of international intercourse.

The varying ways in which states have attempted to accommodate or adjust the interests involved in these competing claims have produced results which on the whole have been disorganized and which sometimes have been eccentric. There is today no obligatory general rule of international law pertaining to foreign civil jurisdictional immunities of

governments. This state of affairs is conducive neither to the promotion of international commercial intercourse nor to the general advancement of world order through institutional legal processes.

II.

FORMATION OF NORMS OF STATE ACCOUNTABILITY

Relevant historical and social value perspectives validate the principle of judicial accountability of governments and substantially support its applicability in both the internal and external arenas of an overwhelming consensus of states.

In the historical perspective, it can be seen that the recognition of the concept of the substantial accountability of a government in its domestic courts antedated by a period of many centuries the development of formal concepts of absolute immunity of sovereigns to their internal judicial processes. Nevertheless, the latter appear to have been almost universally controlling for several centuries, and they were still prevalent in the early nineteenth century when the idea of the judicial immunities of sovereigns began to be tested in the international sphere. Thus, absolute immunity constituted the juridical frame of reference for the initial international decisions on sovereign immunity questions.

Since the time of the initial introduction of absolutist immunity policies into the international arena the juridical reference frame has changed, and absolutist policies no longer accord with either the internal social values or the external

economic and political interests of most states. Democratic ideals have since grown throughout most of the world community, and governments more and more have become conceived of as the servants, not the masters, of the people. Since governmental immunity can be recognized as basically inconsistent with democratic institutions, it has been ameliorated in the internal spheres of most states by restricting the immunities of the domestic governments and making them accountable in a substantial measure, but not completely, in their courts. The policy of substantial governmental accountability has thus become established as the prevalent norm in the domestic arenas of the world community, and the tendency of states during this century has been to extend this policy into the international arena.

A. GROWTH OF STATE ACCOUNTABILITY IN DOMESTIC ARENAS

1. Civil Law Countries

Contemporary policies of governmental accountability among the civil law countries have largely resulted from the influence of the Roman law. In classical Roman law, the settlement of commercial disputes involving the state could be effected only by administrative procedures, and neither of the Roman treasuries, the aerarium, or public treasury, nor the fiscus, or imperial treasury, was initially subject to the processes of the private law.[21]

The Emperor, however, as a natural person, could be subject to the private law, and in late periods of the Roman

Empire the fiscus absorbed the aerarium and enabled the former to participate extensively in commerce. At about that time the state acknowledged the responsibility of the fiscus in accordance with the private law in respect to its commercial activities,[22] and its property relationships.[23] The Roman state thus became suable in its courts in respect to its commercial and proprietary functions, but the state's political and governmental functions remained beyond the pale of the private law.

Though it was supplanted by absolutist concepts of sovereign immunity during the Holy Roman Empire and in the feudal monarchies of the middle ages, the Roman example was eventually revived in the law of Continental Europe during the course of the nineteenth century.[24] There it was combined with early Germanic law principles which emphasized the rights of individuals against governmental authority, and with natural law theories, to furnish a normative background which has inclined most civil law countries toward judicially enforcing governmental responsibility in respect to private rights.[25]

During the nineteenth century a relatively advanced concept of governmental accountability evolved widely on the continent of Europe and in Latin America.[26] In most of these countries the governments remained immune in respect to their political and governmental functions, but they generally became liable in their own courts under ordinary rules of private law in regard to their "fiscal" relations, i.e., their public and private proprietary relationships and their relationships when exercising corporate functions.[27] Implemen-

tation of this concept has varied considerably among these countries, however, and the test has been difficult to apply, especially in borderline cases.

Principles of governmental accountability developed somewhat differently and more thoroughly in France than in other civil law countries. In France, as in most of the rest of Europe, the absolutist concept of immunity of the sovereign had developed along with the concept of sovereignty itself during the medieval period of personal monarchies.[28] In France, as in most other European countries, the standard of governmental responsibility which is said to have prevailed was the "principle of complete irresponsibility."[29] "As the fountainhead power and justice, the monarch was invested with a type of sovereignty which excluded responsibility as to his acts or those acting on his behalf."[30] In the latter nineteenth century, France, rejecting the Romanic theories of its neighbors, began to develop on rational grounds an inordinately liberal standard of governmental accountability in respect to private citizens injured through operations of the domestic government. Dismissing outmoded theories of sovereignty and emphasizing instead the function of the state as a performer of services for the public need,[31] the administrative courts of France finally fabricated a blanket rule of strict liability of the state, both as to contracts and to torts.[32] Subject only to proof of damages and causation, the public, as beneficiary of governmental actions, is deemed to have an absolute responsibility to relieve the damaged individual of his disproportionate share of the expense of governmental operations.[33]

Thus:

> The maxim that the 'King can do no wrong,' has been superseded [in France] by the saying that 'the State is an honest man.' As such, it will seek to repair the damages caused by its wrongful acts and will not seek to avoid liability by taking refuge behind the fictitious dogma of sovereignty.[34]

2. Common Law Countries

The French example stands in sharp contrast with the arduously slow implementation of the principle of governmental accountability within the Anglo-American system. The absolutist concept of immunity of the domestic sovereign had become established in England as a formal principle of the common law in the sixteenth century,[35] and it was there expressed, as it was in the ancient regime of France, in the maxim, "The King can do no wrong." The eighteenth century conception of the immunity of the domestic sovereign was articulated by Blackstone in language which may have provided theoretical and rhetorical reference points for later extension of the absolutist approach into the international sphere:

> . . . [O]ur king is equally sovereign and independent within these his dominions, as any emperor is within his empire; . . . and owes no kind of subjection to any other potentate on earth. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. . . . For all jurisdiction implies superiority of power; authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command execution of it: but who . . . shall command the king?[36]

The remedy available to individuals for invasion of private rights by the crown was said by Blackstone to have consisted of a petition in chancery, upon which the crown's chancellor would "administer right as a matter of grace, though not upon compulsion."[37] However, even where a claim might otherwise be sustainable as a matter of equitable grace, this course of remedy did not allow for a judgment of monetary damages.[38]

It is almost incongruous in view of the ideals of subordination of governmental authority to the rights of individuals which prevailed in the United States during the post-revolutionary period that the American courts would continue to apply the English concept of governmental immunity which had long been associated with monarchial despotism. The absolutist concept was, nevertheless, absorbed into the American jurisprudence with the rest of the common law, despite its irrationality in the American context. The most plausible explanations for this fact would seem to be that it appeared to be an expedient policy in view of the financial instability of the new country,[39] or, more likely still, that there was then in practice no proven alternative to absolute immunity because that concept still prevailed throughout Europe at the close of the eighteenth century. In the United States the common law policy was applied as to municipal corporations and governments of the federal states as well as to the national government, and it was applied more rigidly, perhaps, than it had ever been applied in England.[40] The common law rationale was soon discarded, however, and the same results came to be

justified on more rational but no less doubtful justifications such as the alleged necessity to maintain efficient operation of government by protecting it from interference and annoyance,[41] and the fear that the allowance of suits against governments would lead to unmanageable liabilities.[42]

It was not until the latter half of the nineteenth century that legislative enactments, the Court of Claims Act of 1855 and the Tucker Act of 1887,[43] enabled claimants to maintain suits on contracts of the United States Government, and it was only after World War II that the Federal Tort Claims Act was enacted to authorize the prosecution of tort suits against it in broad classes of cases.[44] On the state and local levels, decisional law inroads and piecemeal legislation have by now made it generally possible to maintain suits against governments on all classes of contracts and to prosecute tort actions against governments on the basis of the Romanic distinction between their governmental and their proprietary functions.[45] The United States has now greatly ameliorated the effects of its initial adoption of the absolutist concept of immunity of domestic governments and has achieved domestic policies of governmental accountability which are comparable to, or slightly more liberal than those which were much earlier adopted by most civil law countries.

The implementation of governmental accountability in the domestic arena of the United Kingdom has closely paralleled that in the United States. The Crown Suits Act, enacted in 1865, created effective judicial remedies against the crown in actions on contract,[46] and the maintenance of tort actions

against the crown became authorized by virture of the Crown Proceedings Act enacted in 1947.[47] The state of the law of governmental accountability in the other countries of the British Commonwealth is comparable to that of the United Kingdom.[48]

3. Soviet Union

No attempt is made to connect the evolution of Western concepts of governmental accountability with the development of current policies of the Soviet Union, for whatever historical connections as might in fact have existed would appear to have been obliterated by the revolution. Moreover, it is evident that the Western conceptions of governmental subjugation to the rule of law do not have precise counterparts within the Soviet system, for it appears to be admitted by Soviet writers that law is conceived of in the Soviet Union as occupying a subordinate position in respect to the fluctuating ideological policies of the communist state.[49]

Nevertheless, it can be said that there appears to be no formal concept of governmental immunity within the internal arena of the Soviet Union,[50] and whatever impediments as are imposed upon the institution of suits against the state in its domestic courts are probably procedural. The internal law confers upon Soviet provencial courts jurisdiction over suits brought against state organs or officials for improper administrative acts and suits against governmental subdivisions.[51] Although it appears to be at least the nominal policy of the

Soviet Government to submit to the jurisdiction of its domestic courts in private suits, the administrative process is the preferred channel for submission of claims against government bureaus. State-owned corporations are, however, liberally amenable to suit in the Soviet courts.[52]

B. EXTENSION OF DOMESTIC NORMS INTO THE INTERNATIONAL ARENA

On the whole, it can be considered that the principle of substantial, though not complete, judicial accountability is now established as a shared legal policy of a large majority of influential states in their domestic arenas. This can be attributed to responsiveness of national decision-makers to demands for social justice and protection of private rights. These same social value forces have operated as a fundamental reason for extending domestic concepts of governmental accountability into the international arena.

1. Formulation of Absolutist Policies

The earliest cited judicial decision pertaining to governmental immunity in the international sense is the 1812 decision of the U.S. Supreme Court in the Schooner Exchange v. Mc Faddon.[53] In his classic opinion, Chief Justice Marshall stated an assumption that international law was then understood to require jurisdictional immunity as to the person of a foreign sovereign, as to foreign diplomatic representatives, and as to foreign armed forces which were allowed to pass

through a state's territory. He attributed to all sovereigns a status of "perfect equality and absolute independence," and a "common interest impelling them to mutual intercourse." From these propositions there was implied a mutual waiver, at least in "cases under certain peculiar circumstances," of judicial jurisdiction over representatives and property of a foreign sovereign which are within another state's territory with the latter's consent.

Although the decision in the Schooner Exchange has often been cited as authority for the application of the absolute concept of sovereign immunity in the international sphere, it is not clear in view of the guarded language which was used that Marshall intended to abridge private rights in such an inflexible manner. It can be noted that the particular case which was before the court in that instance was one which would have compelled the grant of immunity even under liberal modern views,[54] for the object of the suit was the recovery of a vessel which was then in the service of the French Government as a warship. In addition, the tenuous political, military, and economic relationship which then existed between the United States and France would alone have practically compelled a grant of immunity. But of greater significance in this regard is the fact that restrictive policies of governmental immunity had not yet become established in the domestic arenas of the United States or Europe and there was therefore no other contemporary basis of comparison but the absolutist theories. Also significant is the fact that state trading was not then practiced and courts of the period did not envisage the revival

of large-scale participation of governments in commerce.[55]

Even after erosion of absolutist views of governmental immunity had become manifest in the domestic arenas of the United States and England, however, and even after immunity had come to be asserted with frequency on behalf of trading activities and instrumentalities of foreign governments, the Anglo-American courts continued to ignore the limitations of the rule of the Schooner Exchange. The United Kingdom has yet to depart from the absolute concept in its international decisions, though the bases of British decisions appear to have changed. The common law rationale of equality, independence, and dignity of sovereigns appears to have been the ratio decidendi of the initial British application of absolute immunity in the international sphere in 1880,[56] but subsequent decisions have been couched on largely procedural grounds.[57] The House of Lords appeared in 1938 to waver on the brink of rejecting the absolute concept,[58] but indications that the restrictive concept would be followed in the future in the United Kingdom have not yet materialized. The past and present members of the British Commonwealth have deferred to the precedents of the United Kingdom in respect to sovereign immunity,[59] and they, with the United Kingdom, stand apart from other major Western countries in retaining the absolute concept as their nominal international rule.

After the classic decision in the Schooner Exchange, the U.S. Supreme Court appears to have been able to avoid deciding international sovereign immunity conflicts until 1926. In that year, with the State Department pressing for adoption

of the restrictive concept and the Justice Department contending at cross-purposes,[60] the Supreme Court reversed a lower court ruling and confirmed the absolute concept in Berizzi Bros. Co. v. S.S. Pesaro.[61] The Court expressly extended the holding of the Schooner Exchange to merchant vessels held and used in commerce by foreign governments and stated the opinion that the Marshall Court would have done so if state trading had then existed in practice. In the Court's reasoning, a vessel used for state trading served no less a public and governmental purpose than a warship. The State Department continued to proselytize for at least another year on behalf of restricting foreign governments' immunities,[62] but afterward it appears to have adjusted its position for the time being to conform to that of the Supreme Court. It would be a considerable time before the State Department's position would prevail.

During this period, the years following World War I, the Soviet Union emerged as the foremost proponent of the absolute concept of sovereign immunity in the international arena. Contrary to the general trend of states toward restricting immunities in the international sphere in a manner which substantially corresponds with their domestic standards, the Soviet Union has continued to insist upon retention of the absolute concept in the international sphere in spite of the fact that its domestic governmental immunity policies are nominally liberal. The present position of the Soviet Union concerning the immunities of foreign governments in the Soviet courts is reflected by a recent statute which has affirmed the absolute concept as the normal rule of decision in international cases

and which provides for the imposition of retaliatory measures as to states which do not reciprocate in respect to Soviet claims for immunity.[63]

2. Shaping of Restrictive Policies

While the common law countries were still struggling to merely establish fundamental principles of governmental accountability in their domestic arenas, the civil law countries generally ran far ahead in the development of corresponding principles in both the domestic and international arenas. In some civil law countries, it is doubtful that the absolute concept of immunities of foreign governments was ever followed. Many others which initially followed it discarded it in favor of the restrictive concept during the early and middle years of the twentieth century.

The development of the restrictive concept in the international sphere has been comprehensively traced in surveys by Sir Hersch Lauterpacht and Professor Joseph Sweeney.[64] It is indicated that the restrictive concept possibly had its first judicial utterence in international law in Chile in 1860,[65] and that it was clearly reflected in a decision of a Belgian court in 1879.[66] It was articulated by Italian courts in 1886,[67] the courts of Brazil adopted it in 1899,[68] and it was followed by the mixed courts of Egypt in 1912.[69] In the interval between World War I and World War II, the courts of Greece, Austria, Switzerland, France, the Netherlands, and Eire adopted the restrictive concept.[70] The courts of Rumania

and Poland also apparently followed the restrictive concept during that period, [71] but these two countries can now be presumed to adhere to the Soviet Bloc position which is contrary.[72] An administrative court of Russia, in fact, applied the restrictive concept prior to the Soviet Revolution.[73] Post-World War II decisions of the German Federal Republic have followed the restrictive concept.[74]

The Latin American countries are regarded as being generally inclined toward the restrictive concept,[75] and jurists have made similar conjecture concerning Sweden, Denmark, and Norway.[76] Early twentieth century decisions of Luxemborg and post-World War II decisions of Turkey and Japan are regarded as probable indicators of tendencies on part of those countries to follow the restrictive concept.[77]

The United States also adopted the restrictive concept following World War II. The Supreme Court, it will be recalled, had rebuffed earlier efforts of the State Department to promote the restrictive concept in the external sphere. By the time of World War II, however, the Court had come to conceive of the immunity of a foreign government's activities and instrumentalities as primarily a foreign relations problem to be determined by the political branch rather than by the courts, and during the war years the Court made a point of granting,[78] and denying,[79] immunity in accordance with the State Department's suggestions.

With the federal judiciary having thus retired itself to a subordinate position in respect to sovereign immunity determinations, the State Department asserted its new preroga-

tives and announced in 1952 that it would thenceforth follow the restrictive concept in its suggestions to courts in individual cases.[80] The Supreme Court, by uniformly denying certiorari in subsequent cases where the State Department's suggestions were followed, has indicated satisfaction with that arrangement. As of this time, however, it is not perfectly clear how faithfully the State Department itself has been willing to follow the restrictive concept, for there is late indication that political expediencies occasionally still prevail over strict observance of restrictive policies and the requirements of justice in particular cases.[81]

Where the federal judiciary has been left to its own devices by the absence of a specific suggestion by the State Department in a case, it has displayed a tendency in recent years to restrict immunities of foreign governments even further than they have been restricted elsewhere. Thus in 1955, in the National City Bank of New York v. Republic of China,[82] the Supreme Court denied immunity to China in respect to the bank's counterclaims for some $1,600,000 for defaulted Republic of China treasury notes after the foreign government had first invoked the jurisdiction of American courts to recover $200,000 which it had on deposit in an account at the bank. The Court stressed the intrinsic unfairness which would result from disallowing the counterclaims, since under ordinary legal principles they might defeat the claim which the governmental party had brought before the courts in the first place. Noting that the climate of opinion had ceased to favor governmental immunity from suit, the majority of the Court seemed unimpressed

under the circumstances by the dissenting argument that under formal restrictive theories matters pertaining to a state's public debt have traditionally been considered to compel the grant of immunity.

More recently, in 1964, a U.S. Court of Appeals, in Victory Transport, Inc. v. Comisaria General,[83] abandoned the Romanic distinctions which had theretofore typified the decisional law approach to restricting the judicial immunities of foreign governments, and it propounded a more stringent new test. What the court devised was, in effect, a presumption against immunity, which is rebuttable by showing that the governmental defendant's activity giving rise to the claim is of one of the following kinds of political acts: internal administrative acts; legislative acts; acts concerning armed forces; acts concerning diplomatic activity; and public loans. The court, emphasizing the interests of individuals doing business with governments, explained, "We do not think that the restrictive theory . . . requires sacrificing the interests of private litigants to international comity in other than these limited categories."

3. Effects of Growth of State Trading

While the force of demands for social justice and protection of private rights has provided the fundamental requirement for extension of domestic policies of governmental accountability into the international arena, the modern revival of state trading has provided the occasion for it and has been

the principal object of concern. The emergence of Soviet-style state trading has given particular impetus to the trend toward restricting the immunities of foreign governments.

Although governments had participated extensively in international commerce long before the nineteenth century, there appears to be no evidence that the judicial immunities of governments had formally been challenged before then in regard either to state trading or to other state activities. State trading has been traced at least as far back in history as the middle ages, but in the intervening centuries it fell out of practice.[84] During those centuries, it has been seen, absolutist concepts of governmental immunity flourished.

In the nineteenth century state trading had reached a low ebb, laissez-faire policies prevailed, and governments exercised few economic functions.[85] All national governments performed substantially similar functions, and these common functions did not include state trading. Having a community of functions, governments had a shared interest in protecting all their functions from the risk of foreign interference. The initial instances of limited state trading which appeared during the latter part of the nineteenth century were possibly considered by most countries to have been mere aberrations which did not warrant special juridical concern.

By the end of the nineteenth century, however, the effects of the industrial revolution and the continual expansion of international commerce had brought about new imperialistic rivalries and a general trend toward protectionist trade policies and reliance upon governmental involvement in commercial

and economic affairs,[86] and state trading became more commonplace. Concurrently with these developments, Belgian courts had restricted the immunity of a foreign government with respect to its trade monopoly,[87] and other courts had begun to articulate national variations of a restrictive immunity policy based upon Romanic tests.

In the early years of the twentieth century, theorists gave increasing attention to state trading as a possible panacea for the social and economic ills which had followed in the wake of the still advancing industrial revolution.[88] The Soviet Revolution and World War I accelerated the growth of state trading. Military exigencies required the United States and European countries to resort to state trading, and state trading was an intrinsic part of the theories of revolutionary socialists in Russia.[89] The Western countries virtually retired from state trading after the end of the war, but state trading nevertheless became ensconced as a permanently important part of world trade as an aftermath of the Soviet Revolution. It was connected in Soviet planning with state production, and it was deemed to be necessary for the establishment of a strong communist state and for the severence of its economic dependence on the West.[90]

Although only very few European countries had applied the restrictive concept in the international sphere prior to that time, the number so multiplied after World War I that by the beginning of World War II only the Soviet Union, the United Kingdom, and Germany could be counted as major European countries which continued to apply the absolute concept as an

international rule.[91] Moreover, even Germany had made inroads by joining with ten other Continental countries and two Latin American countries in the Brussels Convention of 1926 which had the general effect of extending the restrictive concept to government-owned commercial vessels and cargoes.[92]

Even though the United Kingdom declined to adopt the restrictive concept, the avoidance of sovereign immunity claims in connection with Soviet state trading activities was a matter of concern to it. The Soviet Union had established trade delegations abroad as its normal instrumentalities for state trading, but the United Kingdom declined to receive such a delegation without having first obtained a very substantial waiver of immunity.[93]

In the United States, the State Department began at the end of World War I to argue for the adoption of the restrictive concept,[94] though it is not clear that its position initially had particular reference to the emergence of Soviet state trading rather than to the general involvement of nations in state trading activities during the war and post-war periods. Congress expressed sentiments of sort against state trading by enacting the Public Vessels Act of 1925 which had the effect of acknowledging responsibility on part of the U.S. Government for damages arising from operation of commercial vessels owned or operated by it.[95]

Even after the end of the long period of non-recognition of the Soviet Union the State Department remained adamant against receiving a Soviet Trade Delegation for fear of giving state trading an important entree into the American market

and for fear that pleas of immunity could result in exploitation of American merchants.[96] In addition, there was apprehension concerning Soviet insistence upon diplomatic immunities for commercial agents who would comprise the staff of a trade delegation.[97] Instead, the Soviet Union was required to conduct its business within the United States through a corporation, AMTORG, which had been established in 1924, during the period of non-recognition. The AMTORG Corporation, though wholly owned and controlled by the Ministry of Foreign Trade of the Soviet Union, was incorporated under the laws of New York as the sales and purchasing agent for the Soviet foreign trade monopoly in the United States. As a domestic corporation of the United States, AMTORG was not only fully amenable to civil suit in the United States, but it was subject also to state and federal regulation.[98]

During World War II, the United States and its allies were again required to resort to extensive state trading. Hoping for a return to pre-war patterns of trade relations after the conclusion of hostilities, the United States maintained a policy of minimizing state trading as much as possible during the war. After the war it encouraged others to revert quickly to former private trading practices. American policy contemplated among other things that the Soviet Union again be relegated to conducting its trade in the United States through the AMTORG Corporation.[99]

The whole picture had changed, however. Prior to World War II the Soviet Union had maintained a somewhat indifferent attitude in regard to foreign trade, for it was

then considered to be in the Soviet national interest to minimize foreign trade relationships in order to reduce dependence upon capitalist economic systems.[100] Its acquisition of satellite states in Eastern Europe and alliances in Eastern Asia gave the Soviet Union vast additional bases of power, and the East and West became embroiled in intense political, economic, and ideological cold war. By the early 1950's the Soviet Union, together with its satellites, had acquired the political motivation as well as the economic ability to actively expand trade with less strongly aligned Western countries and to aggressively seek commercial ties with less developed countries.[101] In this context the United States imposed sweeping legislative and administrative restrictions upon American trade with communist states.

It was also in this situational context that the State Department in 1952 announced in "The Tate Letter" that it would thereafter follow the restrictive concept of sovereign immunity in its suggestions to the courts concerning suits against foreign governments. After reviewing the trend of Western countries toward adoption of the restrictive concept, the State Department's Acting Legal Adviser said in his letter to the Attorney General:

> It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. . . . The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. . . .[T]he widespread and increasing practice on the part of governments of engaging in commercial activities

> makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.[102]

An important inference which can be derived from these events is that the growth of state trading has had the effect of activating widespread extension of principles of governmental accountability into the international arena. It can be further reasoned without detracting from the validity of the democratic ideals of state responsibility which have been centrally involved in the matter, that the relative national political and economic interests of private trading countries vis-à-vis the interests of state traders will continue to operate long into the future to influence the trends of international immunity policies.

It does not follow, however, that restrictive international immunity policies can be identified only with the interests of state trading countries. To the contrary, it will be shown in the following chapters that the state traders can embrace such policies without significant prejudice to their national political and economic interests and that they stand to gain in a material sense, as well as in a moral sense by doing so.

III.

APPRAISAL OF THE COMPETING JURIDICAL POLICIES

A. INSUPPORTABILITY OF THE ABSOLUTE CONCEPT

The absolute concept of sovereign immunity lacks essential validity as an international legal policy. It has been seen that it came into limited operation in the international sphere as an outgrowth of domestic law concepts which have since been repudiated by the overwhelming majority of states. It cannot be said that it was ever fully adopted as an international policy by the world community as a whole, and it appears to have been the predominant rule for only a few decades. There is therefore no credible basis for claiming that the absolute concept was ever established as customary international law. Nor can it be validated on other rational grounds.

1. Community Interests Perspective

Proponents of the absolute concept can no longer point to any widely inclusive interests of states which can be served by adherence to the concept as they could in former times. As late as the latter nineteenth century the demand that governments remain free to perform all their functions without the

risk of intervention by foreign courts was consistent with the shared interests of the effective consensus of states. This was usually true irrespective of whether one state might otherwise have had a justiciable interest concerning a private claim brought against another state, for all governments performed approximately the same functions and each had a substantially equal interest in protecting the efficiency of states' common activities on a mutual and reciprocal basis.

It has been seen that the policy of indiscriminately protecting all government activities has lost support in the international arena with the advance of state trading. This has occurred not merely because state trading was long considered unrespectable from Western viewpoint or because it could not widely be perceived to be a legitimate government function--it has already been indicated that most Western countries have sometimes resorted to it. It has occurred for the more cogent reason that there has ceased to be an effective equivalence of state interests which might be served through the blanket grant of immunity to all governmental activities. In other words: "There appears to be no particular community interest in conferring advantage upon the state trading system by permitting . . . an immunity from legal process to which the instrumentalities of the competing system are not entitled."[103]

While all governments no longer perform uniformly common functions and states therefore lack uniformly mutual interests in protecting foreign governments' activities, they do have a shared interest in the promotion of policies which operate to protect their inclusively held legal norms and social values.

2. Social Values Perspective

There has occurred since the industrial revolution a general trend toward "fundamental democratization of society" which reflects community response to intensified social demands for human security and the greater production and sharing of all human values;[104] greater respect for the dignity of individuals, more conscientious concern for individuals' general well-being, more careful regard for the economic security of individuals, and the improvement of standards of public rectitude for protecting private legal rights are examples of the demands. Clear evidence of this trend has been the general growth of state accountability which was described in the preceeding chapter.

The principle of judicially enforced responsibility of governments is demonstrably established in a substantial measure in domestic arenas of most of the world community and can thus be considered to reflect a widely inclusive juridical norm of state accountability. Similarly, the underlying social demands can be understood to reflect the prevalent social value expectations of the world community.

Although humanitarian motives are involved in the matter, neither the principle nor the underlying values are limited in operation to protecting erstwhile helpless individuals harmed by tortious or irresponsible acts of a state or its agents. It has been seen that the principle of governmental accountability has operated also in favor of commercial concerns which transact business with governments, and it is in this area that

the opportunity for sovereign immunity conflicts in the international sphere is the greatest. It can be observed that legal standards comprising the essence of fair dealing and justice in relation to private rights in commercial matters are also considered binding upon most states in their domestic arenas, and this too can be considered to be a widely inclusive juridical norm.

The blanket denial to private parties of access to reasonably convenient forums for the enforcement of claims against foreign governmental wrong-doers obviates private legal rights in a manner which is inconsistent with the prevalent social values and the inclusive juridical norms of state accountability of the world community.

3. Foreign Relations Perspective

The most frequent and most rational justification urged for the grant of immunity to foreign governmental defendants in private suits is that foreign relations could not properly be conducted by the executive branch if judicial jurisdiction were asserted.[105] The argument appears to have found legalistic expression both historically and in modern times in the theory that the exercise of judicial jurisdiction by one state over the activities, representatives, or property of another state is derogatory to the latter's sovereign power, dignity, or independence.

It is relevant here to observe that the rational validity of the underlying political concept of state sovereignty has

itself been cogently challenged, if not fully discredited, during this century.[106] It is not sufficient, however, to rest the case against sovereign immunity merely upon the denial of sovereign substance of governmental acts, for there appears to be continued widespread acceptance of the concept of sovereignty, at least as a convenient juridical tool. Assuming, then, the validity of the sovereignty concept, the rational validity of a claim for judicial immunity based upon it is nevertheless limited.

For one thing, it is difficult to perceive how a state's legitimate interests are violated by enforcing against it in the external arena the obligations which it, in common with other states, has admitted to be enforceable in principle against it in its own courts. It is all the more so where the forum state's assertion of jurisdiction is supported by a substantial connection with the controversey and a reasonable standing to adjudicate it, and where the forum makes a logical choice of law to govern its decision, and where it does in fact apply appropriate law justly, evenly, and with due regard for the integrity of the defendant state's legislative and administrative processes. Under these circumstances it would be the forum state's legitimate interests which would be derogated if its exercise of jurisdiction were disallowed.[107]

Even states purporting to follow the absolute concept in the international sphere have recognized certain instances where the forum state has a justiciable interest in the controversey which is sufficient to override countervailing claims for immunity. Accordingly, it has been widely accepted in such

states that the forum's paramount concern for the determination of interests in real property situated within its territory and in the determination of interests in estates administered by it warrants its exercise of jurisdiction over foreign governmental parties.[108] By comparison, it does not appear that a state's interest in the redress of alleged wrongs committed against its nationals by foreign governments, or its interest in redressing torts committed within its territory or contracts executed or to be performed there, is of a materially inferior order than its concern for the orderly administration of real property and estates.[109]

The credibility of claims that a defendant state's important interests are violated by the exercise of foreign judicial jurisdiction in civil suits is minimized when one considers the nature of the relief which is characteristically sought in bringing suits against foreign governments. In the typical instance the private claimant seeks merely the recovery of monetary damages which are ascertainable through ordinary private law rules, and most often the only extraordinary factor in the case is the fact that the defendant is a foreign government. The claimant does not seek a form of relief which would entail a superiority of authority or the application of force on part of the forum state to enforce. He does not seek, for example, to cause the forum to modify or annul a legislative or administrative enactment of the defendant government, nor does he typically seek equitable relief such as specific performance or mandatory or prohibitive injunction against officials of the foreign state.[110]

B. PROBLEMS CONCERNING THE RESTRICTIVE CONCEPT

The essential insupportability of the absolute concept of sovereign immunity has caused many states to limit the instances in which foreign governments might be considered immune from their civil judicial jurisdiction. The result has been the development of an international jurisprudence which in principle is an improvement over the absolute concept but which is still fraught with doctrinal and practical imperfections. The most fundamental of these is the objection that the restrictive concept does not yet satisfy the best democratic ideals of justice.[111]

1. Limitations from a Democratic Perspective

It can be observed that the decisional law process of restricting immunities in the international sphere has uniformly begun on the assumption that there is a requirement for immunity to be granted in respect to many governmental functions, and it has then proceeded to deny immunity only in respect to the kinds of governmental activities as to which it would be most unconscionable to grant it. Instances where immunity has been denied have generally involved foreign government activities of a commercial character. The process has tended to confirm immunity as to most other state activities, i.e., those which are patently non-commercial. The restrictive immunity concept is therefore subject to the criticism that it does not go far

enough in denying immunity.[112]

On the face of the matter, it seems questionable whether it can ever be a legitimate interest of a government in a democratic society to shield any of its activities from enforced accountability at the expense of the right of private individuals and commercial concerns to obtain redress for harm sustained as result of governmental operations.[113] On the other hand, it can be persuasively shown that this standard of idealism is not practically attainable on a comprehensive international scale.

It is recalled in this connection that there is an observable trend toward greater democracy in the world community, and it can be considered that a number of states already have achieved a high degree of democracy in their national institutions. Some strongly democratic Western countries, moreover, appear to be advancing toward the complete abrogation of governmental immunities within their domestic arenas; the outstanding example of this is France, for nowhere else has the complete abrogation of judicial immunities of a government in its domestic courts been more closely approximated.[114] Yet, as far as can be ascertained, none of these countries--not even France--has asserted that there should be a general abandonment of civil jurisdictional immunities in international practice.

This can be explained partly by the fact that states can perceive that they have a community interest in protecting their common functions from interference by foreign authorities through the grant of immunity to other governments upon the

basis of expectations of mutuality and reciprocity. As shown above, the factor of reciprocity does appear to operate effectively in the matter except where an uncommon state function, e.g., state trading, is involved.[115] If it can thus be understood in terms of granting immunity only in regard to states' common functions and excluding from immunity the functions which are not uniformly performed by all states, then the restrictive concept can easily be reconciled with the community interest.

It is submitted, moreover, that the restrictive concept has additional justification as an international legal policy because it accords with the prevalent juridical norms and social value expectations in the domestic arenas of states even though it does not fully satisfy the highest ideals of some states. The fact is that the strong standard of accountability which is applied to the French State in its domestic arena, or even the somewhat milder standard which operates internally in the United States, does not prevail in most other states. To the contrary, the prevalent test of state accountability in the domestic sphere appears to be the Romanic distinction between the political and "fiscal" functions of governments which is employed with national variations in most of the civil law countries.[116]

A large number of countries can therefore view the restrictive concept of sovereign immunity as merely the logical extension of their domestic law norms into the international sphere. As to other states, the restrictive concept can be viewed in light of political realities as a compromise which

serves fairly to balance the community interest in minimizing foreign restraints upon states' free exercise of functions in the international arena and the community interest in providing forums to private claimants for the redress of violations of legal rights.

Considering furthermore that continuing difficulty is being experienced in efforts to achieve effective consensus in regard to a community policy which merely limits the immunities of states, there would appear to be practically no hope of achieving broad support for a substantially more drastic policy within the foreseeable future. The restrictive concept is at least palatable from a democratic perspective because it does operate to deny immunity in the majority of instances in which claims are likely to arise, and it would appear to be amply justified from that perspective because it is the most liberal standard prospectively attainable on a comprehensive scale.

2. Doctrinal Deficiencies

The approach of the civil law courts which began to develop restrictive international immunity policies around the turn of the century was to construct a formalistic framework in which to distinguish the immune and non-immune activities of states. For a theoretical foundation they drew upon their idiomatic expressions of Romanic law concepts which they had adopted to rationalize the principle of limited state accountability in the domestic sphere.[117]

The civilians reasoned that:

> . . . the immunity, as it had developed in the 19th Century, was intended to apply only with respect to acts involving the sovereignty of a foreign state. They described these acts as public acts, or political acts, or acts done jure imperii. They reasoned that the immunity was never intended to extend to . . . other acts, variously described as private acts, acts of a civil nature, or acts done jure gestionis. . . .[118]

There is a thread of common policy running through the civilian decisions. The courts applying the Romanic tests have rather consistently classified governments' patently commercial transactions as of the jure gestionis category and in respect to these transactions have relegated the governmental parties to the ordinary legal processes.[119] The clearly commercial acts of governments are thereby removed from the mystique of sovereignty and are required to meet the demands of justice and fair dealing on a par with the transactions of private traders.

The common thread ends there, however, for it seems impossible to glean from the international decisions any clear or comprehensible standard which can be of much help to courts in borderline cases, i.e., those involving states' activities which are neither clearly public, political, or jure imperii on one hand, nor clearly private, civil, or jure gestionis on the other.

While governments' transactions in the conduct of commercial businesses appear to be regarded with fair regularity to be of the jure gestionis category, what about a government's financial dealings connected with the business of the state's

treasury, for example? In a manner reminescent of Romanic distinctions between the state and the fiscus,[120] a Swiss court "unhesitatingly" affirmed its jurisdiction in an action brought against the Austrian Treasury by the Swiss holder of Austrian treasury bonds which were purchased in Switzerland and were repayable in Swiss currency.[121] A contrasting viewpoint seems to be implicit in a later French decision in which jurisdiction was denied over the "sovereign" act of the Bank of Spain where the bank refused to give new currency in exchange for old, no longer valid currency which has been remitted to it by the claimant.[122]

Moreover, the fact that a state's transaction is commercial in form gives no assurance under the decisions that immunity will be granted if its ultimate purpose is sovereign. For example, a contract of the Government of Rumania for the purchase of leather for its army has been held in Italy to be an act of a private law nature not entitling Rumania to immunity,[123] but a contract of the State of Vietnam for the purchase of cigarettes for its army was held by a French court to justify immunity because it was a state function performed for the public service.[124]

A practical difficulty with the restrictive concept is, then, that it is presently ill-defined. This has certainly resulted in part from the tendencies of national decision-makers to frame their international decisions in terms of their domestic precedents and in part from the fact that this important and complicated international juridical policy has been conceived and developed principally in terms of formalistic

and highly abstract theories. So great has been the resultant uncertainty and confusion in the application of the restrictive concept, and so frequently have there been eccentric decisions by courts in attempting to apply these hardly ascertainable standards, that courts and commentators alike have sometimes declared the restrictive concept to be unworkable on this account.[125]

3. Concomitant Problems

The uncertainty and confusion which have characterized efforts to formulate restrictive policies of sovereign immunity through the decisional law process have been aggravated by a general divergence of national practices for implementation of the restrictive concept. While it is beyond the scope of inquiry here to examine in detail the various judicial modes which are connected with the operation of restrictive policies, an appraisal of the general efficacy of restrictive policies requires brief mention of local practices which operate frequently to modify or obviate the substantive rights of claimants to proceed against foreign governmental defendants. Policies of permitting the exercise of civil jurisdiction over foreign governments in broad classes of cases have opened the door to concomitant questions which are somewhat procedural in character and which are therefore especially susceptible to nationalistic variations of treatment.

It has been observed, for example, that modes of asserting and acquiring jurisdiction over foreign governmental defendants

vary considerably among states which have adopted the restrictive concept. There are no clear or uniform rules for defining the categories of representatives of governmental defendants which may permissibly be served with judicial process under general principles of international law or upon which process may be served within the forum's territory to establish in personam jurisdiction under the forum's rules. Moreover, the validity of extraterritorial service of process upon officials of foreign governmental defendants within the defendants' territory in accordance with the forum's rules has sometimes been upheld by national courts but remains debatable on a general scale.[126] Also, while the attachment of a foreign government's property within the forum's territory appears to be uniformly approved in principle among restrictive concept states as a means of aquisition of in rem or quasi in rem jurisdiction, the limits of the kinds and character of the property which may be attached remains problematical.[127] The judicial enforceability of a judgment against a foreign government is even more doubtful, and it is probably impossible in most instances. A few states have permitted execution against commercial property of foreign governments, but most states which have otherwise purported to follow the restrictive concept, including the United States, have flatly denied execution against all property of foreign governments.[128] Policies of many restrictive concept states are indefinite in this regard.[129]

Divergencies of modes by which states determine or recognize the validity of sovereign immunity claims in particular

cases have been a source of further uncertainties and resentments. It has been a frequent practice of states to rely upon executive officials to effectively decide the factual and legal issues concerning the grant or denial of immunity in individual cases, but it has sometimes seemed questionable to impartial observers whether or not the executive branch of a government is capable of deciding these juridical issues without giving undue weight to national political objectives or to foreign relations expediencies.[130]

C. POLICIES FOR REGULARIZING STATES' IMMUNITIES

1. Need for Regularization

There have been seen to be most compelling reasons why the absolute concept of sovereign immunity should be universally abandoned in the international sphere in favor of policies which fairly balance the prevalent social value expectations of the world community and the inclusive political and economic interests of states. The restrictive concept of sovereign immunity, as it has been developed through the unilateral decisional law efforts of states, does essentially satisfy those requirements--but more than that is needed. The general effectiveness and acceptability of restrictive policies as an international juridical standard have been seriously impeded by ambiguities and uncertainties in formal doctrinal expressions and by divergencies in national implementation.

In an era of continual intensification of economic,

social, and political interdependence of the world community, this state of affairs hardly satisfies the minimal requirements of international legal order. To the contrary, the least requirements of orderly international intercourse would seem to require the establishment of comprehensible and predictible national sovereign immunity policies to guide private parties and governmental parties of divers nationalities in the development and discharge of their mutual legal relationships. In addition, intergovernmental friction and resentments which have been attributed to sovereign immunity conflicts in the past could be reduced in the future if decision-makers were able to refer to a body of stable, ascertainable, and consistent policies to govern both their assertions of immunity abroad and their determinations of immunity claims asserted in their own forums by other states.

This point of view seems to be implicit in the recent reasoning of a U.S. Court of Appeals in Victory Transport, Inc. v. Comisaria General.[131] Dealing in that case with a claim for damages to a vessel chartered by an agency of the Spanish Government to transport wheat for distribution in Spain, the court demonstrated impatience with the Romanic theories which have dominated the decisional law approach to restricting immunities. Instead of attempting to use the traditional tests, the court looked to the functional objective of restrictive immunity policies which it conceived to be the balancing of the "interests of individuals doing business with foreign governments in having their legal rights determined by courts and the interest of foreign governments in being free to perform

certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts." As if intending to restate the entire restrictive concept in that functional context, the court offered the empirical test of restricting immunities to certain ennumerated categories of acts "about which sovereigns have traditionally been quite sensitive."[132]

What is needed, then, is a means to regularize international sovereign immunity policies on a comprehensive global scale in a manner well suited for reducing highly ambiguous doctrinal pronouncements to workable and definitive rules and for eliminating important irregularities in national practice. The most likely mode for accomplishing this, it will be seen, would be codification of restrictive immunity principles through multilateral treaties.

Cogent reasons for continuing efforts to develop and refine the restrictive concept of sovereign immunity were indicated in the preceding two sections of this chapter. Additional strong reasons for doing so are disclosed by considering the possible alternatives.

2. Alternative Modes for Regularization

It is unnecessary to repeat here the arguments which persuasively dispose of claims to the validity of the absolute concept of sovereign immunity. Similarly, it has been amply shown that the other extreme alternative, the general abrogation of state immunities, can be written off for the foreseeable

future as a political impossibility regardless of its idealistic merits. There are, however, other compromise approaches to the sovereign immunity problem which have been suggested by jurists as alternatives to the restrictive concept.

One such suggestion is that the liabilities which a state has assumed in its domestic arena as an expression of its own concept of governmental accountability be extended to claimants in other states on a reciprocal basis through treaties. In support of reciprocity as a basis for determining immunity claims, reference can be made to the fact that most states are today substantially accountable in their domestic courts. It is arguable, furthermore, that the rule would be a convenient one because the domestic liabilities of states are of known or ascertainable content and that it would be politically acceptable to most states because no new or additional liabilities are imposed upon them in the international sphere.[133]

Specific statutory support for the reciprocity approach in the United States is found in an enactment which provides that "citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts have the privilege of prosecuting claims against the United States in the Court of Claims . . . ."[134] Also, reciprocity is indicated as a possible alternative to absolute immunity in the courts of the Soviet Union by a statutory provision which authorizes the Council of Ministers to prescribe retaliatory measures against states which are sued in the Soviet courts but which do not grant

immunity in their own forums in suits against the Soviet Union.[135] Other examples of reciprocity exist in practice but need not be detailed here.[136]

An important argument which has been made against the reciprocity approach is that the policy of the defendant state in granting immunity to other states is not relevant to the merits of a claim made against it and would not justify the denial of a remedy to the individual claimant. In Lauterpacht's words:

> The misgivings and the criticism to which the grant of jurisdictional immunity to foreign states occasionally gives rise are due not so much to the absence of reciprocity as to the fact that it is possible for a foreign state or its agency to disregard or invade with impunity rights otherwise protected by the law of the land. The adoption of the principle of reciprocity would accentuate--it would not remove--what is increasingly considered to be an undesirable situation.[137]

An alternative suggested by Lauterpacht is to assimilate by treaty the immunity of the defendant state to that of the forum state under the forum's domestic law. This, it is argued, would subjugate the defendant state to the forum's domestic expectations of governmental accountability,[138] and, since the forum would apply a familiar body of law--its own, the assimilative approach would enhance predictability and uniformity of results within a given state.

A practical objection to the assimilative approach, and one which would appear to be decisive in a realistic political context, is that it would virtually deprive a state of all means of direction over its external liabilities and

would possibly put some states in apprehension of uncontrollable foreign interference with their external activities. For example, reasons which will appear clearly below make it inconceivable that the Soviet Union could be persuaded to submit to such a rule in the foreseeable future, although it does appear to be within the realm of possibility to expect that the Soviets will eventually agree to a compromise policy based upon restrictive principles.[139] Furthermore, without suggesting that such objections have much validity or would even be decisive in many instances, it is predictable that some states would hesitate to accept the assimilative approach for the mere reason that it would have the politically undesirable result in some instances of giving foreign claimants a greater right to proceed against the state than that enjoyed by the defendant state's own domestic claimants. There would be, for example, a significant gap between the accountability of the United States under its own laws and the level of accountability which might be imposed upon it if sued in France under the latter's more liberal standards of state responsibility.

Both the assimilative and the reciprocity approaches are subject to the additional broad objection that neither of them lends itself in a large degree to unifying international immunity policies or to eliminating national divergencies from international practice. Under either concept, the rule of decision would be determined solely by reference to the law of a single state. While this might be conducive to greater uniformity and predictability within individual states, the

need for uniformity on a comprehensive global scale would not be significantly served.

Instead of employing treaty mechanisms in a manner which might tend to perpetuate the division of international immunity policies, it seems more desirable to utilize them to consolidate, define, and make more effective the advances which have already been made through the decisional law process.

One such approach would be the creation of a supranational judicial institution having competence to adjudicate private claims made against states. One commentator has alluded to numerous proposals which have been made for establishing private international claims courts or arbitration panels for that purpose.[140] An obvious difficulty with such a proposal, however, is the reluctance often shown by states to commit themselves to submitting their disputes to the jurisdiction of forums other than their own. Not only have states frequently been reluctant to consent to the exercise of jurisdiction over them by courts of other states, a fact which is manifest in the nature of the problems considered in this study, but there also has been considerable unwillingness on part of states to submit unreservedly to the competence of supranational tribunals. The lack of compulsory jurisdiction of the International Court of Justice and the self-judging reservations of some states regarding the Court's jurisdiction are well known examples of this tendency.[141] Without compulsory jurisdiction over states, the possible benefits to be derived from creating a supranational private claims forum would be limited.

An additional problem is posed by the lack of a definite or uniform international legal standard for defining and measuring the liabilities of states in respect to private claimants. It has been commented in this connection, "The creation of a court is not equivalent to creating a jurisprudence." "Contrariwise," it is continued, "given a body of ascertainable law, the selection of a forum for its enforcement is not difficult."[142] Accordingly, the regularization of international legal standards of governmental accountability appears to be the first requirement, and if that is accomplished, then the need for an international claims forum is obviated.

The remaining approach--one which appears to be desirable in all events--is the regularization of the law of sovereign immunity by multilateral codification of restrictive international immunity policies. It is submitted that the only likely alternative to the comprehensive codification of restrictive policies appears to be the indefinite prolongation of the present state of disorganization in this important area of international legal concern.

IV.

CODIFICATION OF RESTRICTIVE IMMUNITY POLICIES

A. POTENTIAL USEFULNESS OF CODIFICATION

It has been suggested above that courts have thus far failed to achieve certainty or uniformity through their decisional law efforts to formulate restrictive immunity policies partly because of their tendencies to apply their divergent municipal law policies in international cases and to couch their policy decisions in difficult abstractions. In addition, it would seem also to result in part from limitations upon the competence of national decision-makers to unilaterally render policy pronouncements which are comprehensively authoritative.

There are numerous reasons why the general treaty approach is better suited for achieving what the decisional law approach has failed to do. In the multilateral treaty-making process states act not unilaterally but in concert. The power of the concerted will of a majority of states and the negotiating power of minorities are probably at their greatest, and expectations of mutuality and reciprocity work most urgently. World opinion is focused upon individual

states. Exchanges of ideas during preparatory work and plenary sessions disclose virtually all relevant points of view. Reasons are expounded, and national interests, both legitimate and illegitimate, are exposed and subjected to scrutiny and judgment. Pressures are put upon dissenting states to conform to the majority will and, in turn, upon the majority to compromise its view to accommodate important minority viewpoints. The resultant treaty can usually be assumed to reflect the prevalent values and the inclusive interests of the states represented.

The objective of limiting the jurisdictional immunities of states in the international sphere is clearly a meritorious one from a democratic perspective, but the questions remain: how greatly can states realistically expect to restrict immunities on a broad international scale? how far do states actually want to commit themselves to submitting to the judicial control of other states? with what degree of precision should restrictive policies be stated? It can be observed that in innumerable instances where a high degree of particularization has been required concerning legal problems common to a large group of states, resort to the multilateral treaty approach has been required to achieve it. That appears to be the case here.

World legal order would be significantly advanced by the agreement of a large number of states in respect to a set of uniform and manageable rules which could be perceived to reflect the community values and interests. Universality or near-universality of assent would not be required, nor could

it realistically be expected to be achieved in the very near future. The effective establishment of a treaty codification, perhaps one patterned on the Brussels Convention which will be considered below, would serve not only to advance the interests of signatory states in their mutual relations. It might serve also as an authoritative expression of international public policy by which even the accountability of non-signatory states could be measured.

B. APPRAISAL OF PAST CODIFICATION EFFORTS

The frequency with which sovereign immunity claims have arisen and the pervasive economic, political, and social implications connected with such claims have from time to time during the past half-century aroused interest among international lawyers for regularizing the law of sovereign immunity by treaty codification. Only a very few multilateral treaties have been produced as a result of this concern, however, and the few treaties which have involved sovereign immunity have focused merely upon the maritime aspects of the problem. The only consummated efforts to regularize sovereign immunity policies in other areas of commerce have been by bilateral agreements.

1. Brussels Convention

The most consequential codification effort to date has been the Brussels Convention of 1926,[143] which has been adopted by a small number of maritime states. The tenor of

that treaty was to define the jurisdictional immunities of state-owned vessels along the same restrictive lines as had been attempted by some states through the decisional law process, but the precise and definitive terminology which was employed constituted a significant improvement over the traditional tests which had been used by the courts.

Article 1 of the Convention provides as a basic rule that vessels owned or operated by states and state-owned cargoes are to be assimilated to private vessels and cargoes with respect to liabilities connected with operation of the vessels and carriage of the cargoes. The second and fourth articles affirm that the liabilities of such vessels and cargoes will be adjudicated by the same courts and in accordance with the same laws and procedures as those available in cases of private merchant vessels and cargoes.

The first section of article 3 of the Convention specifies in the following terms the functional types of state-owned vessels which are not assimilated to private vessels for jurisdictional purposes and the remedies which are available in cases of such vessels:

> The provisions of the two preceding Articles shall not be applicable to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on Governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*.
>
> Nevertheless, claimants shall have the right of taking proceedings in the competent tribunals of the State owning or operating the vessels, without

> that State being permitted to avail itself of its immunity in . . . [specified classes of admiralty claims].

Analagous rules are provided in regard to state-owned cargoes carried on immune government vessels,[144] and for state-owned cargoes carried on private merchant vessels "for Governmental and non-commercial purposes."[145]

The Brussels Convention has been adhered to at different times by a total of only eighteen states, and this number includes neither the United States, the United Kingdom, nor the Soviet Union.[146] Apparently no more than fourteen states now adhere to it, for four original adherents were subsequently absorbed into the Soviet Bloc and can be assumed to have denounced the treaty.[147] The reason assigned by the United States for its decision to not participate in the Convention was that it had already enacted the Public Vessels Act of 1925,[148] and it had thereby "already given effect to the wish for uniformity in the laws relating to State-owned ships."[149] In reality the statute did provide effectively for balancing the interests of the United States and those of a foreign claimant in event of litigation involving a public vessel or cargo of the United States abroad, but it did not actually admit the applicability of the restrictive concept in respect to such vessels and cargoes in foreign courts.[150]

Despite the disappointing lack of wide acceptance of the provisions of the Brussels Convention, its current validity and its potential value for helping to regularize the maritime aspects of the sovereign immunity problem has been demonstrated

as recently as 1957 when the Inter-American Bar Association resolved to encourage states to ratify it.[151]

2. Continuing Interest in Codification

Codification hopes received further encouragement following the Brussels Convention when in 1927 the League of Nations Committee of Experts for the Progressive Codification of International Law took up the subject of the competence of courts in regard to foreign states. Questionnaires which were sent by the committee to numerous states disclosed that although many states had important reservations, most states did favor codification in principle.[152] Thereafter, the Harvard Research undertook to prepare a comprehensive draft convention.

The 1932 Harvard Research Draft Convention on Competence of Courts in Regard to Foreign States dealt with the broad commercial and proprietary aspects of sovereign immunity and went far toward restating the restrictive concept in precise and easily understandable terms. For distinguishing immune and non-immune governmental activities, article 11 provided:

> A State may be made a respondent in a proceeding in a court of another state when, in the territory of such other state, it engages in an industrial, commercial, financial, or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.
>
> The foregoing provision shall not be construed to allow a State to be made a respondent in a proceeding relating to its public debt.[153]

In 1949 the United Nations International Law Commission placed the question of jurisdiction over foreign states and their property in a position of relatively high priority on its list of topics to be codified.[154] The commission's work on this subject has been reflected in a limited way in the 1958 Convention on the Territorial Sea and the Contiguous Zone.[155] The commission reaffirmed its interest in this general subject in 1962,[156] but, unfortunately, further results of this interest have not yet been forthcoming.

3. Territorial Sea Convention

The problem of immunities of vessels in respect to foreign judicial jurisdiction was treated in section III of the 1958 Convention on the Territorial Sea and the Contiguous Zone in the context of the right of innocent passage of vessels through foreign territorial waters.[157] Sub-section A (articles 14 through 17) prescribes general rules of innocent passage applicable to all ships. Sub-section B (articles 18 through 20) prescribes additional rules applicable to merchant ships. The pertinent article of sub-section B, article 20, recognizes in the following terms a limited right of a coastal state to exercise judicial authority over foreign merchant vessels within its territorial waters:

> 1. The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.
>
> 2. The coastal State may not levy execution against or arrest the ship for the purpose of any

civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

3. The provisions of the previous paragraph are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for purposes of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Article 21 provides that the above-quoted provisions apply as well to government vessels operated for commercial purposes, and article 22 exempts government vessels operated for non-commercial purposes from those provisions. The net effect is to equate government commercial vessels to private merchant vessels for purposes of amenability to civil judicial process for limited classes of claims while in the territorial sea of a foreign state. Absolute jurisdictional immunity of warships and other government vessels operated for non-commercial purposes is left intact.

The United States objected to the inclusion of any limitation on the competence of a coastal state to exercise jurisdiction in respect to private and governmental vessels within its territorial waters,[158] but it has subsequently ratified the Convention without reservations.[159] A more serious objection was made by Rumania on behalf of the Soviet Bloc with regard to the provisions which authorize a coastal state to exercise a measure of judicial authority over foreign governmental commercial vessels without the flag state's consent.[160] All Soviet Bloc states which have ratified

the Convention have registered reservations on that account,[161] to which the United States has objected.[162]

While narrow in their operational scope and totally rejected by the Soviet Bloc, the relevant provisions of the Territorial Sea Convention may be taken as indication of support for the restrictive concept on part of the more than fifty states whose concurrence was required to include them in the Convention.[163]

C. PROSPECTIVE ROLES OF THE MAJOR PARTICIPANTS

1. Leading Western Countries

Despite hopeful signs that the idea of multilateral codification of restrictive immunity policies is gradually gaining an effective base of support in the international community, this approach has thus far not succeeded for some important reasons. In the first place, relatively few states have shown concerted willingness to commit themselves unequivocally to restrictive policies in the external arena. Symptomatically, there has been no sustained effort to regularize immunity policies in a broad scope--there have been only sporadic codification attempts concerning narrow aspects of the problem.

Indefiniteness of purpose on part of leading Western countries undoubtedly has contributed heavily to the insufficiency of past codification efforts. Such indefiniteness has been most clearly evident on part of the United States

and the United Kingdom, both of which have failed to sign the Brussels Convention and the latter of which has not yet adopted the restrictive concept in its decisional law. It is submitted that the quantum of agreement which will be required to establish a minimally effective system of international legal policies concerning governmental immunities will be the consensus of the private trading segment of the world community. It would appear that positive leadership on part of the major industrial and commercial Western countries will be practically indispensable to achieving even such a minimally effective arrangement.

Although a definite American point of view began to emerge after World War II, the United States has not yet shown evidence of any strong desire for general codification. It is to the credit of the United States that in the past two decades it has shown willingness to promote the regularization of restrictive policies in a less ambitious and less conspicuous manner, however.

Since 1949 the United States has entered into at least fourteen bilateral treaties or agreements concerning trade or navigation wherein the parties have consented to the mutual application of restrictive principles in terms which are considerably clearer and more precise than the traditional decisional law language.[164] The following is typical of the relevant provisions contained in these agreements:

> No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, manufac-

> turing, processing, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.[165]

Although no such agreements have been concluded by the United States with any Soviet Bloc countries, the post-war treaty practice of the United States has undeniably advanced the development of restrictive policies among the countries within its own sphere of influence. The American influence would be even better utilized in the future, however, if it were directed toward obtaining comprehensive multilateral codification.

If the United Kingdom actually has a point of view in the matter, it is difficult to ascertain it. Considering that its domestic standards of governmental accountability are comparable to those of the United States, the inertia of the United Kingdom with respect to restricting immunities in the international sphere is not easily understood. It can be observed that the United Kingdom is probably the most extensively nationalized of the leading Western states, and it might therefore be speculated that there is some reluctance on part of the United Kingdom to renounce the alleged right to claim immunity on behalf of its state enterprises in foreign courts. This is unfortunate, for in view of the prominence of the United Kingdom in the international community almost any decisive move on its part toward the adoption of restrictive policies in the international sphere would significantly

increase the momentum of the general restrictive trend. In addition, the United Kingdom has a sphere of special influence comprising the remnants of the Commonwealth and some of the former Commonwealth members which in the past have given obeiscance to the British example concerning sovereign immunity questions.[166]

Other major industrial and commercial Western countries, the German Federal Republic, Japan, France, and Italy for example, have shown receptiveness to restrictive principles. In view of their eminence in world trade, their effectiveness as exponents of codification could be quite great. Moreover, as leaders in burgeoning East-West trade activities, they are in a superior position to influence the Soviet Bloc in this matter.[167]

2. Soviet Union

Although it would appear possible to achieve a minimally effective general codification arrangement with only the concurrence of most of the private trading states, it seems clear that the eventual achievement of an optimally effective systemization of international immunity policies would require, in addition, the assent of the state trading segment of the world community. In particular, the assent of the Soviet Union would be required.

There is a substantial identity of interests and ideology between the Soviet Union and its satellites, and the influence of the Soviet Union is possibly controlling upon them in regard to sovereign immunity, as it is in many

other matters.[168] Consistently with its usual practice of interpreting international law in a manner which would advance its national interests and policies, the formal position of the Soviet Union has continually been to press for retention of the absolute concept of sovereign immunity as an international policy.[169]

The formal Soviet posture in this regard is clearly illustrated by the reservations of the Soviet Bloc to the provisions of the Convention on the Territorial Sea and the Contiguous Zone which would authorize coastal states to exercise limited judicial jurisdiction over state-owned commercial vessels.[170] On the other hand, it will be seen that the Soviet Union has repeatedly yielded to the realities of international commerce and has made practical arrangements to adapt to restrictive trends in the West and to meet in many instances the minimal demands of Western traders for the security of their commercial transactions. Having gone this far when necessary as an expediency of the moment, however, the Soviets have consistently refused to go the remaining distance and to accept the restrictive concept in principle.

A critical question is then posed: in view of past experiences, how is it now possible to envisage that there will be more favorable prospects for obtaining Soviet assent to the codification of restrictive immunity policies in the future? A possible answer can be derived from analysis of the nature and operations of Soviet foreign trade and the relationship of trade to the over-all international objectives of the Soviet Union.

V.

APPRAISAL OF SOVIET COMMITMENT TO THE ABSOLUTE CONCEPT

A. IDENTIFICATION OF SOVIET SPECIAL INTERESTS

Under the Soviet Constitution, the conduct of foreign trade is a function of the State and is defined as a state monopoly.[171] It was decreed in 1918:

> All foreign trade is nationalized. Contracts for the purchase or sale of all kinds of products (the products of mines, of industry, of agriculture and others) with foreign governments or individual enterprises abroad will be carried out in the name of the Russian Republic by specially empowered organs. Apart from these organs every contract for trade, for purchase or sale abroad is forbidden.[172]

In operation, the monopoly of the state comprises the "exclusive right of the state to define all principal directions and aspects of foreign trade activity, including the procedure for distribution of the results of savings of social labor derived from foreign trade."[173] The state's exclusive right is implemented by direct state participation through governmental bureaus, by indirect participation through trading corporations created by the state, and by centralized planning and control over exports, imports, and the commercial shipping activities of both kinds of organizations. Other important

features of implementation include the establishment of currency and price controls, allocation of trading rights among state bureaus and state corporations, and detailed central control of operations of all such organizations, including control over the provisions of individual contracts.[174]

Ultimate control over foreign trade activities is vested in the Council of Ministers, the supreme executive and dispositive body of the Soviet Government, whose responsibility includes coordination of internal and external economic policies with the overall foreign policies and military policies of the Soviet Union. Routine management and control of foreign trade are vested in the Ministry of Foreign Trade.[175]

It can be concluded that the trading activities of the Soviet State are thoroughly integrated organizationally with other functions of the government which are of undisputed sovereign character, i.e., the administrative, political, and military functions. And there can be little doubt that foreign trade is actually operated by the Soviets as an integral component of the implementation of their international political, military, and ideological objectives,[176] to such an extent, perhaps, that the objective of economic gain is quite frequently subordinated to the other objectives.[177]

In contrast with private trading systems wherein economic motivation is the predominant force, the foreign trade system of the Soviet Union is most closely interfused with the political and military bases of national power. Thus the matter of protecting its foreign trade machinery from intimations of possible foreign interference has assumed extraordinary

importance to the Soviet Union. The relevant implications are two-fold. In the first place, the complex character of Soviet foreign trade activity provides uncommon motivation for the Soviet Union to press for immunity in respect to its trade machinery. In the second place, one cannot really think that the conduct of foreign trade in the Soviet system is in fact performed less as a sovereign function than are the political and military activities of the state. Therefore, in the context of theories which have typically been advanced as bases for restricting immunities in international decisional law, the complex character of Soviet trade gives theoretical plausibility, if not rational persuasiveness, to its claims for immunity in respect to its trade apparatus.[178]

For many years it was a policy of the Soviet Union to minimize trade relations with the non-communist world in order to promote its economic autonomy, and the absolute concept of sovereign immunity has been consistent with that policy. Furthermore, there could be no strong public interest in the Soviet Union for enabling citizens to sue foreign governments in commercial matters since individuals and private concerns are prohibited in the Soviet Union from transacting foreign trade.

When the Soviet Union has departed from its isolationist trade policy in order to benefit by the establishment of trade relations with particular Western states, it has been required as a practical reality to accommodate private traders' demands for an efficient channel of redress to assure the stability and security of trade transactions.[179] In doing so, however,

the Soviet Union has been careful to avoid compromising permanently or in principle whatever standing it might have to assert immunity on a broad international scale in respect to its trade activities and property.

B. SOVIET CONCESSIONS TO WESTERN DEMANDS

1. Trade Delegations

Formerly, the principal means of Soviet implementation of its foreign trade monopoly was through trade delegations stationed abroad.[180] Trade delegations, which continue to operate on a diminished scale, are components of the Soviet Ministry of Foreign Trade to which they are directly responsible.[181] Their general functions are defined in the following terms by a 1933 statute:

> . . . Trade representations of the USSR in foreign states shall be agencies of the USSR, which carry out abroad rights of the USSR in the sphere of the monopoly of foreign trade belonging to it.
>
> . . . [T]rade representations shall fulfill the following tasks:
>
> a) . . . represent the interests of the USSR in the sphere of foreign trade and assist the development of trade and other economic relations with the [receiving state]. . . .
>
> b) . . . regulate foreign trade of the USSR with the [receiving state]. . . .
>
> c) . . . carry out foreign trade of the USSR with the [receiving state]. . . .[182]

Authority is given to a trade delegation by the statute to conclude trade contracts and transactions on behalf of the

Soviet Union,[183] to regulate and control all trade activities between Soviet entities and the entities of the receiving state, to perform foreign trade operations for Soviet trading corporations,[184] and to sue as plaintiff in foreign courts.[185] On the other hand, the statute restricts a trade delegation to appearing as a defendant only in a suit in the receiving state which arises from a trade transaction concluded by the trade delegation in the receiving state, and then only where the Soviet Government has by a treaty or a unilateral declaration consented to suit against a trade delegation in the receiving state in such cases.[186] As to all other suits, it would be required by the statute that a trade delegation claim diplomatic immunity.[187]

Although it is significant that the Soviet Union would agree to any degree of local judicial control over trade delegations, it can be observed that the provisions of the statute do not compromise the Soviet position regarding the absolute concept of sovereign immunity. The exercise of jurisdiction by the receiving state would still depend upon the prior consent of the Soviet Government. It can be observed also that the Soviet Union has been unwilling to concede under that arrangement more than the bare minimum of local jurisdiction that would ordinarily be demanded by a Western firm as a prerequisite to concluding a trade transaction with a trade delegation.

The Soviet position concerning the immunities of trade delegations would still disallow the exercise of jurisdiction by a receiving state in three important classes of suits:

actions respecting trade contracts concluded by a trade delegation outside the receiving state in which suit is brought; actions respecting trade contracts concluded by Soviet organizations other than trade delegations; and tort actions and actions on contracts other than trade contracts. The Soviet Government has, however, been able to conclude a number of bilateral treaties whereby Western states have accepted the jurisdictional limits required by the statute.

Objections to the insufficiency of Soviet concessions of local jurisdiction over trade delegations appear to have been partly responsible for the United States' refusal to receive a delegation.[188] Such objections also appear to be implicit in decisions of French courts which at times have upheld the exercise of local jurisdiction over the Soviet Trade Delegation in France in suits on contracts concluded outside of France by other Soviet organizations, notwithstanding the existence of a Franco-Soviet treaty containing jurisdictional limitations of the kind which have been referred to.[189]

Another difficulty with the Soviet position concerning the immunities of trade delegations is that the Soviet Union has been increasingly unwilling to subject its property to the processes of local courts. It is noted that the Soviet statute concerning trade delegations is silent in this regard, apparently in order to leave the question open to negotiation in the formation of individual treaties. In the agreement whereby a trade delegation was received by the United Kingdom in 1930, jurisdiction over all Soviet property within the United Kingdom, except for property necessary for the exercise

of rights of sovereignty and consular and diplomatic property, was conceded broadly to the process of British courts in disputes arising from commercial transactions concluded by the trade delegation within the United Kingdom.[190] A contrast is noted in connection with a similar treaty executed by the Soviet Union and the German Federal Republic in 1958, when the Soviet bargaining power had undoubtedly improved. In the latter treaty, the scope of the Soviet property which was made subject to execution by German courts was more restrictively delimited, and all Soviet property of whatever kind was exempted from interim attachments.[191]

It is relevant to note also that other Soviet Bloc countries use trade delegation systems patterned on the Soviet model and that each of these countries accords full jurisdictional immunity to others' trade delegations.[192]

Although the trade delegation device is still widely used by the Soviet Union, the role of a trade delegation in the actual execution of individual trade transactions appears to have been reduced in practice to that of agent and guarantor for contracts executed by Soviet trading corporations and enterprises of the receiving state. Through the establishment of a system of state corporations as its primary mode for conduct of foreign trade, the Soviet Union has gone still further toward adapting to the restrictive immunity policies of the West--and still without derogation of its position in support of the absolute concept of sovereign immunity.

2. State Trading Corporations

It is claimed by the Soviets that virtually all of the foreign trade of the Soviet Union, 95 per cent of its exports and nearly 100 per cent of its imports, is now conducted by about fifty state trading corporations.[193] These are state-owned organizations or governmental agencies which have been clothed with a special commercial status. Each is established by a separate charter which creates it as an independent entity and which defines its powers and permissible spheres of operations.[194] Their spheres of operations are allocated to them in terms of particular products or territories over which they have monopoly rights.[195]

Both the Soviet internal law and the charters of state trading corporations carefully distinguish between the trading corporations and the state by conferring legal autonomy upon the corporations and specifying that transactions concluded by them are binding only upon them.[196] They are not immune from suit in the Soviet Union, nor are claims of immunity now asserted in their behalf in foreign countries in suits arising from commercial transactions.[197] Inasmuch as both the civil law courts and the common law courts of the West have had relatively little difficulty in establishing jurisdictional bases in respect to governmental corporations which are organizationally separate entities,[198] the Soviet concession in this respect consists not so much of its disclaimer of immunity on behalf of state trading corporations as of its promotion of the corporations as its primary form of trade

instrumentality.

The institutional structure of the Soviet trading corporations is apparently calculated to serve dual purposes in Soviet foreign trade operations. First, the legal separation from the government is conducive to expansion of trade by promoting among foreign traders the expectation that sovereign immunity will not be asserted in defense of suits against the corporations. Second, the separation lends credibility to Soviet claims that foreign assets of the government cannot lawfully be charged with obligations created by trading corporations and that the assets of a corporation are similarly not chargeable for obligations of the government or of other corporations. The latter problem has been a troublesome one for the Soviet Union, for some Western courts, apparently assuming that in the Soviet Union all commercial property is ultimately owned by the state and that the Soviet foreign trade monopoly is functionally indivisible, have exercised jurisdiction over property of some Soviet entities on account of the obligations of some others.[199]

3. Arbitration Agreements

Increased emphasis upon arbitration has been another significant method by which the Soviet Union has attempted to adapt its foreign trading practices to accommodate demands of Western traders for an efficient means of institutional settlement of commercial disputes. Arbitration clauses are, of course, usual provisions in international commercial

contracts, and they are widely used now in the foreign trade operations of the Soviet Union and other Soviet Bloc states.[200]

In negotiations with Western business firms, it has become usual for Soviet trade organizations to attempt to obtain assent to the inclusion of contractual provisions whereby disputes would be submitted to arbitration. To this end, the Soviet Ministry of Foreign Trade has constituted a Maritime Arbitration Commission to consider disputes arising from maritime carriage contracts and a Foreign Trade Arbitration Commission to consider disputes arising from other classes of commercial contracts. Soviet trade organizations usually attempt to persuade the Western traders with whom they deal to designate the appropriate one of the Soviet arbital bodies in their contracts. Although the Soviet commissions are said to enjoy a favorable reputation for fairness and impartiality, and their awards are usually subject to the supervision of Soviet courts, Western traders sometimes balk at submitting their disputes to the Soviet commissions. In such instances, Soviet trading organizations are often willing to agree to arbitration in another country, frequently Sweden or Switzerland.[201]

Arbitration agreements have their primary importance in relation to sovereign immunity where they are contained in contracts to which trade delegations are committed, for, as indicated above, it is unlikely that immunity claims will be asserted on behalf of Soviet trading corporations. The 1958 Soviet treaty with the Federal German Republic, to which reference has previously been made, provides that arbitration

clauses of commercial contracts concluded or guaranteed by the Trade Delegation in Germany will obviate the right of recourse to German courts in suits on such contracts.[202] It can be observed therefore, that the Soviet Union has fully recognized the value of the arbitration device as an alternative for the avoidance of sovereign immunity confrontations in foreign countries.

C. PROSPECTS FOR FURTHER CONCESSIONS

It is evident from the foregoing that the Soviet Union has not in recent times regarded the right to assert sovereign immunity on behalf of its foreign trade apparatus as indispensable for its mode of conduct of trade. To the contrary, it has entered into bilateral agreements with individual Western states whereby it has consented to the exercise of foreign judicial jurisdiction over its trading instrumentalities in important classes of cases, and it has adjusted the institutional structure of its foreign trade instrumentalities in such a manner as to practically accommodate the restrictive immunity policies of the West and the demands of private traders for legal protection of transactions. Furthermore, Soviet trade instrumentalities have made wide use of practices which have enabled them to practically eliminate sovereign immunity issues from many transactions. Yet the Soviet Union has not quit its advocacy of the absolute concept.

By its use of the devices which have been examined previously in this chapter, the Soviet Union has only waived

in a limited sphere its alleged right to claim immunity on behalf of its trade instrumentalities, or else it has only made practical arrangements for the avoidance of sovereign immunity confrontations. It has, in other words, kept its options open by carefully preserving its position, and in effect it has reserved the standing to invoke immunity in respect to its trading activities and property in other instances and at other places and times when it might appear to be in the national interest to do so.

One important implication of this has to do with the nature of Soviet foreign trade and its functions as an economic weapon in the cold war arsenal. The potential value of foreign trade for this purpose was not exploited by the Soviets until about the end of the Stalinist era. Prior to that time the foreign trade monopoly was conceived of by the Soviet Union as having a principally defensive economic function of helping to protect against "coordinated foreign policy directed against the U.S.S.R. and other socialist countries by imperialist countries through integrated capitalist monopolies."[203]

By the end of the Stalinist period the economy of the Soviet Bloc had developed sufficiently to enable its foreign trade monopolies to be deployed offensively toward neutralizing the Western-oriented nations, breaking up the alliances of the United States, and drawing unaligned countries and less developed countries into the Soviet sphere of influence.[204] On the United States' part there were imposed special anti-communist trade restrictions by legislative enactment,[205] and by promulgation of a system of executive policy controls.[206]

Somewhat similar to the latter was the executive policy decision to adopt the restrictive policy of sovereign immunity.[207] Dominant United States policy assumptions from that time to the present have been that economic dealings which would increase Soviet Bloc power relative to the West should be avoided and that foreign trade might be used by the Soviet Union to cause economic injury to a Western trading partner for political purposes.[208]

There can be little hope that the Soviet Union would be easily persuaded to give up its carefully guarded sovereign immunity options at a time when there is tension and unpredictability in East-West trade relations generally and mutual suspicion and hostility in Soviet-American trade relations in particular. If, however, some recent indications of an increasingly favorable commercial climate and signs of growing interest in Soviet trade within the American business and political communities eventually materialize in the establishment of trade relations in which commercial considerations control over national political and military objectives,[209] it will then be reasonable to hope for achieving Soviet assent to codification of restrictive sovereign immunity policies. Apart from the moral advantages and the world opinion advantages that it might gain by doing so, there could be practical advantages--such as the promotion of the confidence of prospective trading partners.

There is yet another important implication to be drawn from the analysis in this chapter, and it is that from the Soviet viewpoint the issue of sovereign immunity is negotiable. The fact that the Soviet Union has given treaty consent to

the exercise of limited foreign judicial jurisdiction in the past shows that it is sometimes willing to trade away its claims to immunity concerning its commercial activities. On the other hand, the tenacity with which the Soviet Union has preserved its claims in regard to the absolute concept of sovereign immunity gives ample assurance that it will not give away its alleged right without requiring in return some important concessions which will serve to protect the Soviet foreign trade apparatus from the risk of unlimited foreign judicial control.

VI.

OUTLOOK FOR ACHIEVING AN EFFECTIVE CONSENSUS

A. PROJECTIONS ON CURRENT TRENDS: SUMMARY AND CONCLUSIONS

1. The Minimal Effective Order

It has been shown in this study that the absolute concept of sovereign immunity is insupportable from any useful analytical perspective as an international legal policy. Since it operates to protect all the activities of governments from any responsibility to private claimants, it is incompatible with the prevalent juridical standards of accountability of states in their domestic arenas--including even domestic law standards of the Soviet Union, which is the leading positive proponent of the absolute concept in the international arena, and the domestic standards of states such as the United Kingdom which possibly have merely failed to renounce the absolute concept in the external sphere for lack of a strong point of view in the matter. The concept is also inconsistent with the underlying social value expectations upon which the domestic juridical standards can be presumed to be based.

Claims that absolute immunity is required from a foreign

relations perspective to avoid affronting other states are negatived by considering, among other things, that it is an affront to the forum state to prevent its courts from adjudicating important classes of private law controversies in which the forum has substantial and legitimate concern. Furthermore, the private trading countries which comprise the larger segment of the world trading community, have important national political and economic interests in maintaining juridical equality between their principal instruments of foreign commerce, private traders, and the instrumentalities of rival state trading systems.

The restrictive concept of sovereign immunity has advanced widely in Western countries as an alternative to the absolute concept. Essentially it is a compromise policy which eliminates the strongest objections which are made to the absolute concept, for it makes states accountable in foreign courts in most instances which give rise to private claims, i.e., states' commercial transactions. It is generally supportable as an international legal policy because it substantially accords with the prevalent juridical standards of accountability of states in their domestic arenas, and it serves to balance states' community interests in protecting their common governmental functions from intolerable foreign interference. The fact that there apparently have not been instances of formal diplomatic protests or of interruptions of friendly relations among states on account of the exercise of civil judicial jurisdiction over the commercial activities or property of foreign states has shown that restrictive immunity principles are generally tolerable from a foreign relations perspective.[210]

Although the restrictive concept is subject to the criticism that it still permits immunity to be granted in some instances at the expense of claimants' private legal rights, it is shown that the restrictive concept is the most liberal immunity policy which is likely to be supported by the consensus of the world community in the foreseeable future. However, the restrictive concept is not yet a fully workable international legal policy. Though it has been applied in the decisional law of numerous Western countries, there has been a notable lack of uniformity among the decisions. This is attributable in part to the tendencies of decision-makers to decide international immunity claims by reference to their domestic precedents and their tendencies to use difficult and highly abstract methodologies in this matter. It is also attributable in part to the limited competence of decision-makers of individual states to make policies which are widely authoritative in the international sphere. Furthermore, among the states which have followed the restrictive concept there has been little definiteness or uniformity concerning collateral questions such as service of process upon representatives of foreign states, attachment of states' property and vessels, and levy on such property and vessels to execute judgments. Moreover, it is not always clear among these states that the juridical principles and the values which are at stake always prevail over foreign relations expediencies in affecting decisions.

Although it would appear that the basic policies and many of the details of implementation could be clarified

through multilateral treaty codification, there has been surprisingly little effort in this direction and a disappointing lack of leadership among major Western countries in this regard. Therefore, though there now appears to be a consensus of Western countries in favor of the restrictive concept, it is an inchoate consensus and not yet an effective one.

It is contended that world legal order would be significantly advanced by a concerted effort merely on the part of the private trading states to achieve broad systemization of uniform and workable immunity policies, for difficult problems have been attributable to the extensive involvement of governments in international commercial and economic affairs as well as to their less extensive state trading ventures. It can be observed that at least fourteen Western countries have supported limited codification in connection with the Brussels Convention and that five of these same states and nine others have recently entered into bilateral agreements with the United States which particularized a basic rule of immunity based upon restrictive principles.[211] In addition, numerous states approved the codification of a very narrow immunity issue which was treated from a restrictive approach in the Convention on the Territorial Sea and the Contiguous Zone. It can be concluded, therefore, that there are now good prospects for obtaining the assent of the great majority of private trading countries in regard to multilateral codification of general restrictive immunity policies.

2. Optimal Order

For such a system to be of optimal effectiveness, however, it would have to embrace the state trading segment of the international community. This would turn largely upon the assent of the Soviet Union, a country which has continually contended for the absolute concept.

There are strong reasons why the Soviet Union has adhered to the absolute concept. For one thing, the Soviet foreign trade monopoly has been operated as an integral part of the machinery for implementation of over-all national political, military, and ideological objectives, and the Soviet Union thus has an uncommonly strong motive for protecting its trade apparatus from the risk of foreign interference or control. A dominant Soviet policy in times past has been to isolate the national economy from the capitalist economic systems, and the absolute concept was consistent with that policy. Moreover, since private Soviet businessmen are barred from engaging in foreign trade, the Soviet Union is not appreciably concerned with enabling its nationals to sue foreign governments in commercial matters.

Nevertheless, when the Soviet Union has found it necessary or expedient to trade with the West it has practically accommodated Western traders' requirements for an efficient means to enforce their transactions. Although in doing this the Soviet Union has never compromised its arguments for retention of the absolute concept, Soviet practice does show

that the right to claim immunity in commercial matters is not considered by the Soviet Union to be indispensable for protecting its trade apparatus. In addition, it shows that the Soviet Union is often willing to bargain concerning immunities.

In recent years the Soviet Union and its satellites have adopted policies which tend to favor active trade with the West, and there are indications that economic motivation is coming to the fore in Soviet policy-making. Depending, of course, on other unpredictable events occurring in the course of East-West relations, it seems entirely conceivable that the Soviet Union soon will determine it to be in the national interest to enter the mainstream of world trade with the primary objective of receiving economic gain. In that event it would be beneficial to accept restrictive immunity policies in principle in order to promote the trust of Western trading partners and thereby compete more effectively in world commerce. It can therefore be concluded that there is favorable prospect for achieving Soviet assent to restrictive immunity policies in the foreseeable future; this conclusion is strengthened by considering that the general trend of world opinion seems to be overwhelmingly toward restricting foreign states' immunities.

There is a caveat: it seems certain that the Soviet Union would insist upon a significant quid pro quo. Specifically, in exchange for giving any form of blanket consent for the exercise of foreign judicial authority in respect to its commercial activities, it is predictable that the Soviet Union would demand the inclusion of safeguards which would assure

against abuse of judicial processes and to guard against the deprivation of important state property. To protect the state from indiscriminate suit, for example, some forum non conveniens test or substantial connections test might have to be developed. Also some new procedures might be needed to guard against the loss or prolonged deprivation of important state property or of a vessel. On the other hand, there are respected authorities in the West who consider such safeguards to be desirable in any event.[212] Furthermore, it can be noted in regard to the latter requirement that the United States has long had a procedure for giving bond or pledging its credit to effect the release of its vessels which are attached abroad.[213]

B. RECOMMENDED POLICIES

There can be observed to be a continuing inclination on the part of American courts and jurists to philosophize over the restrictive concept of sovereign immunity and to propound new theoretical grounds for distinguishing the immune and non-immune activities of foreign states. Hence, in recent years there have been advanced in the United States some new theories, such as a test which is apparently analagous the "act of state" doctrine,[214] and a distinction between the essential and the nonessential activities of states.[215] While the proponents' concern for improving the restrictive concept of sovereign immunity is well justified, it is doubtful from a practical viewpoint that these theories are substantially better than the highly abstract and uncertain traditional tests which they would replace.

Rather than to devote their intellectual labors to the formulation of new theoretical grounds which might produce more restrictive but not more predictable results than the traditional theories, it would be better from a practical point of view for jurists to give the courts more objective and workable rules of decision by consolidating, refining, and improving the effectiveness of the restrictive immunity policies which are presently in wide use in other countries. This appears to have been the approach of the few multilateral treaty efforts which have been undertaken concerning sovereign immunity, and altogether it is the more plausible approach for obtaining uniformity in the law.

It is the political branch of the United States Government, however, which has the greatest opportunity to lead in the refinement and regularization of restrictive immunity policies--a field in which the political branch has not heretofore excelled. A decisive step in this direction would be to apply the restrictive concept consistently in suggestions to the courts in future cases. A possible further step toward assuming leadership in this matter would be to secure the United States' adherence to the Brussels Convention--an action which would set a favorable example for other states.

Moreover, the considerable influence of the United States would be well employed if used to persuade other states to join with it in the general codification of restrictive sovereign immunity policies. It can be hoped in this regard that the United States will constructively and positively support the codification efforts of the United Nations

International Law Commission. It is further to be hoped that the United States will be receptive to the inclusion of such reasonable methods and procedures as would reduce the risk of unnecessary interference with commercial activities and property of foreign governments without impairment of claimants' substantive rights.

FOOTNOTES

[1]E.g., J. Sweeney, The International Law of Sovereign Immunity, 4-17 (1964).

[2]Setser, The Immunities of the State and Government Economic Activites, 24 Law & Contemp. Prob. 291,307 (1959).

[3]Leonard, The United States as a Litigant in Foreign Courts, 52 Am. Soc'y Int'l L. Proc. 95 (1958). But see Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Y. B. Int'l L. 220, 251 (1951).

[4]See, e.g., J. Sweeney, supra note 1, at ii.

[5]Setser, supra note 2, at 308; Letter from Jack B. Tate to Phillip B. Perlman, May 19, 1952, in 26 Dep't State Bull. 948 (1952) [hereinafter cited as The Tate Letter].

[6]See American Assembly, Columbia University, Uses of the Sea, 156-57 (1968).

[7]See pp. 28-34 infra.

[8]M. Mc Dougal & W. Burke, The Public Order of the Oceans, 137-38 (1962) [hereinafter cited as Mc Dougal and Burke].

[9]Compare p. 19 infra, with p. 22 infra.

[10]Compare p. 20 infra, with p. 24 infra.

[11]See Chemical Natural Resources, Inc. v. Venezuela, 420 Pa. 134, 215 A.2d 864 (1966), cert. denied 385 U.S. 802 (1966).

[12]Setser, supra note 2, at 292.

[13]Allen, State Trading and Economic Warfare, 24 Law & Contemp. Prob. 256,274 (1959).

[14]Setser, supra note 2, at 292.

[15]See pp. 31-34 infra; The Tate Letter, supra note 5.

[16]Committee for Economic Development, East-West Trade--A Common Policy for the West, 41 (1965).

[17]Friedmann, National Courts and the International Legal Order: Projections on the Implications of the Sabbatino Case, 34 Geo. Wash. L. Rev. 443,446 (1966).

[18]United Nations, International Law Commission, Survey of International Law, 30, U.N. Doc. A/CN.4/1 Rev.1 (1949).

[19]Leonard, supra note 3, at 96.

[20]C.f. Setser, supra note 2, at 292.

[21]H. Street, Governmental Liability, 13 (1953).

[22]Id., at 14.

[23]Setser, supra note 2, at 293.

[24]H. Street, supra note 21, at 14.

[25]Setser, supra note 2, at 293.

[26]Id., at 306.

[27]H. Street, supra note 21, at 15.

[28]L. Duguit, Law in the Modern State, 5-10 (1919).

[29]B. Schwarz, French Administrative Law and the Common Law World, 268 (1954).

[30]Id.

[31]L. Duguit, supra note 28, passim.

[32]B. Schwarz, supra note 29, at 268-71.

[33]Id., at 295-98.

[34]Id., at 270.

[35]W. Prosser, The Law of Torts, 770 (2d ed. 1955).

[36]1 W. Blackstone, Commentaries on the Laws of England, sec. 242 (Lewiss ed. 1897).

[37]Id.

[38]Borchard, Governmental Liability in Tort, 34 Yale L. J. 1, 2 n.2 (1924).

[39]H. Street, supra note 21, at 8-9.

[40]See Id., at 3-9; Borchard, supra note 38, at 2-3.

[41]Setser, supra note 2, at 294.

[42]H. Steiner & D. Vagts, Transnational Legal Problems, 519 (1968) [hereinafter cited as Steiner & Vagts].

[43]Court of Claims Act of 1855, 28 U.S.C. 1491 (1964); Tucker Act of 1887, 28 U.S.C. 1346(a) (1964).

[44]Federal Tort Claims Act of 1949, 28 U.S.C. 1346(b), 2671-89 (1964). For an insight into the problem of collecting judgements against the U.S., see Steiner & Vagts, supra note 42, at 138.

[45]W. Prosser, supra note 35, at 775.

[46]Crown Suits Act of 1865, 28 & 29 Vict., c. 104.

[47]Crown Proceedings Act of 1947, 10 & 11 Geo. 6, c. 44.

[48]Setser, supra note 2, at 304.

[49]E.g., E. Pashukanis, The Soviet State and the Revolution in Law, [1930] in Soviet Legal Philosophy, 237, 279 (H. Babb Transl. 1951).

[50]Setser, supra note 2, at 306-07.

[51]J. Hazard, Settling Disputes in Soviet Society, 407 (1960).

[52]Setser, supra note 2, at 306-07.

[53]Schooner Exchange v. Mc Faddon, 11 U.S.(7 Cranch) 116 (1812).

[54]See generally Mc Dougal & Burke, supra note 8, at 130-36.

[55]S. Sucharitkul, State Immunities and Trading Activities in International Law, 14, 19 (1959).

[56]The Parlement Belge, [1880] 5 P.D. 197.

[57]Cf. The Porto Alexandre, [1920] P. 30 (C.A.). The court appeared to rationalize the result largely in terms of a rule that jurisdiction could not be exercised over a vessel unless its owner could also be libelled in personam.

[58]See The Cristina, [1938] A.C. 485, wherein the House of Lords affirmed the immunity of a foreign state's commercial vessel but gave dictum which appeared to have prophesied the later adoption of the restrictive concept.

[59]J. Sweeney, supra note 1, at 39-40.

[60]2 H. Hackworth, Digest of International Law, 429-30, 437 (1941).

[61]Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926).

[62]See 2 H. Hackworth, supra note 60, at 481.

[63](1964) Code of Civil Procedure of the R.S.F.S.R., art. 435, 3 Sov. Stat. & Dec. No. 2-3, 52 [1967].

[64]Lauterpacht, supra note 3, at 250-71; J. Sweeney, supra note 1, at 20-56.

[65]See J. Sweeney, supra note 1, at 40.

[66]Lauterpacht, supra note 3, at 253.

[67]Id., at 251-52.

[68]J. Sweeney, supra note 1, at 40.

[69]Id., at 28.

[70]See Lauterpacht, supra note 3, at 256-64.

[71]Id., at 256, 259.

[72]J. Sweeney, supra note 1, at 41.

[73]Lauterpacht, supra note 3, at 259.

[74]J. Sweeney, supra note 1, at 36.

[75]Id., at 40-41; Lauterpacht, supra note 3, at 265-66.

[76]J. Sweeney, supra note 1, at 41.

[77]Id.

[78]See, Ex parte Republic of Peru, 318 U.S. 578 (1943).

[79]See Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

[80]The Tate Letter, supra note 5.

[81]See generally Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966), cert. denied 385 U.S. 802 (1966); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961).

[82]National City Bank of New York v. Republic of China, 348 U.S. 356 (1955).

[83]Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), cert. denied 381 U.S. 934 (1965). Further comment on the case at p. 51 infra.

[84]Hazard, State Trading in History and Theory, 24 Law & Contemp. Prob. 243 (1959); Allen, supra note 13, at 256.

[85]S. Sucharitkul, supra note 55, at 14.

[86]Id., at 15.

[87]See Lauterpacht, supra note 3, at 253.

[88]Hazard, supra note 84.

[89]S. Sucharitkul, supra note 55, at 15-16.

[90]Hazard, supra note 84, at 244-45.

[91]See generally Lauterpacht, supra note 3, at 256-64.

[92]International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, Brussels, Apr. 10, 1926, 76 L.N.T.S. 199 [hereinafter cited as Brussels Convention].

[93]Temporary Commercial Agreement Between the United Kingdom and the Union of Soviet Socialist Republics, Apr. 16, 1930, art. 2, 101 L.N.T.S. 410, [hereinafter cited as United Kingdom-Soviet Agreement].

[94]Supra notes 60, 62.

[95]Public Vessels Act, 46 U.S.C. 741-48 (1925), the general scheme of which is here described. The following categories of U.S. vessels and property are affected:

1) Vessels owned, operated, or possessed by the U.S. or by a corporation owned exclusively by the U.S., and cargo owned or possessed by the U.S. or such corporation (46 U.S.C. 741); and

2) Privately owned vessels not in the possession of the U.S. or such corporation but which are arrested or attached upon a cause of action alleged to have arisen in connection with previous ownership, operation, or possession by the U.S. or such corporation (46 U.S.C. 744).

In the event that foreign judicial jurisdiction is exercised over such a vessel or its master or over such cargo, then the Secretary of State in conjunction with the Attorney General may direct the local U.S. Consul to claim immunity on behalf of the vessel or cargo, or, without prejudice to the right of the U.S. to claim immunity, to undertake bond or to appear and pledge the credit of the U.S. if necessary to effect the release of the vessel or cargo (46 U.S.C. 747). The foreign claimant in such a case would appear to have the option of prosecuting an admiralty claim by libel in personam in a U.S. District Court (46 U.S.C. 742).

[96]Hazard, supra note 84, at 248.

[97]Steiner & Vaghts, supra note 42, at 569.

[98]Hazard, supra note 84, at 248-53.

[99]Id.

[100]Committee for Economic Development, supra note 16, at 11.

[101]See U.S. Congress, Joint Economic Committee, Subcommittee on Foreign Economic Policy, New Directions in the Soviet Economy, 938 (1966); Allen, supra note 13, at 271.

[102]The Tate Letter, supra note 5.

[103]Mc Dougal & Burke, supra note 8, at 138.

[104]M. Mc Dougal & Associates, Studies in World Public Order, 338-39 (1960) [the authors attribute the quoted phrase to Mannheim, Man and Society in an Age of Reconstruction, 44 (1940)].

[105]Setser, supra note 2, at 294.

[106]See generally, L. Duguit, supra note 28.

[107]See Lauterpacht, supra note 2, at 229.

[108]J. Sweeney, supra note 1, at 24-25; Harvard Research, Draft Convention on the Competence of Courts in Regard to Foreign States, Comments, 26 Am. J. Int'l L. Supp. 572-97 (1932).

[109]Claudy, The Tate Letter and the National City Bank Case: Implications, 52 Am. Soc. Int'l L. Proc. 80, 85 (1958).

[110]Steiner & Vaghts, supra note 42, at 518.

[111]For an interesting exposition of this view, see the intemperate but literary dissenting opinion of Musmanno, J., in Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864, 881 (1966), cert. denied 385 U.S 802 (1966).

[112]Mc Dougal & Burke, supra note 8, at 155; at 137 the authors acknowledge that "it still seems desirable . . . to immunize the more important government functions of the state from substantial interference by the authorities of another state."

[113]See generally, e.g., L. Duguit, supra note 28, at 197-242.

[114]See p. 16 supra.

[115]Pp. 35-36 supra.

[116]P. 15 supra.

[117]See Id.

[118]J. Seeney, supra note 1, at ii.

[119]Id.

[120]P. 15 supra.

[121]Kingdom of Austria Finance Ministry v. Dreyfus, 44 BGE 49, 54-55, [1918] J. Trib. 594 (Fed. Trib. 1918), as noted by Lauterpacht, supra note 3, at 258.

[122]Martin v. Bank of Spain, 80 Clunet 654, [1953] Int'l L. Rep. 202, No. 42, (Cass. 1952), also noted by J. Sweeney, supra note 1, at 32.

[123]State of Rumania v. Trutta, [1926] Guir. Ital. I. 774, 53 Clunet 780 (Cass. 1926), as noted by the Harvard Research, supra note 108, at 626.

[124]Gugenheim v. State of Vietnam, [1962] G.d.P. 186 (Cass. 1961), as noted and cited by J. Sweeney, supra note 1, at 32, 7.

[125]E.g., Victory Transport, Inc. v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964), dert. denied 381 U.S. 934 (1965); Lauterpacht, supra note 3, at 224-25.

[126]Steiner & Vaghts, supra note 42, at 578-79.

[127]Id., at 518; J. Sweeney, supra note 1, at 125-33.

[128]Collins, The Effectiveness of the Restrictive Theory of Sovereign Immunity, 4 Colum. J. Transn. L. 119, 137-38 (19650.

[129]See J. Sweeney, supra note 1, at v-vii.

[130]U.N. International Law Commission, supra note 18, at 33-34.

[131]Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), cert. denied 381 U.S.934 (1965).

[132]The ennumerated categories of acts are stated at p. 28, supra.

[133]Leonard, supra note 3, at 104.

[134]28 U.S.C. 2502 (1964).

[135](1964) Code of Civil Procedure of the R.S.F.S.R., art. 435, 3 Sov. Stat. & Dec. No. 2-3, 52 [1967].

[136]Several additional examples are given by Evans, Should Sovereign Immunity be Governed by Reciprocity?, 52 Am. Soc. Int'l L. Proc. 85, 86 (1958).

[137]Lauterpacht, supra note 3, at 246.

[138]Id., at 221, 226.

[139]See pp. 82-83 infra.

[140]Leonard, supra note 3, at 103.

[141]For a concise description of this problem, see W. Bishop, International Law, 62-68 (1962).

[142]Leonard, supra note 3, at 103.

[143]Brussels Convention, supra note 92.

[144]Id., art. 3, sec. 2.

[145]Id., art. 3, sec. 3.

[146]From S. Sucharitkul, supra note 55, at 98, and Mc Dougal & Burke, supra note 8, at 150 and n. 178, one can adduce that the following states have at some time adhered to the Brussels Convention: Belgium, Brazil, Chile, Germany, the Netherlands, Italy, Denmark, Norway, Sweden, France, Greece, Portugal, Switzerland, Turkey, Estonia, Hungary, Poland, and Rumania.

[147]Mc Dougal & Burke, supra note 8, at 150 n.178, indicate that Poland has denounced the Brussels Convention. The views expressed by Hungary and Rumania concerning the Territorial Sea Convention, indicated at pp. 64-65 and notes 160 and 161 infra, are inconsistent with the Brussels Convention. The de facto political status of Estonia as a republic of the U.S.S.R. makes its current position plain.

[148]Public Vessels Act, 46 U.S.C. 741-48 (1925).

[149]S. Sucharitkul, supra note 55, at 98-99.

[150]Public Vessels Act, 46 U.S.C. 741-48 (1925); see supra note 95.

[151]J. Sweeney, supra note 1, at 44.

[152]U.N. International Law Commission, Future Work in the Field of Codification and Progressive Development of International Law, [1962] 2 Y. B. Int'l L. Comm'n 89, U.N. Doc. A/CN.4/SER.A/1962/Add.1.

[153]Harvard Research, Draft Convention on Competence of Courts in Regard to Foreign States, art. 11, 26 Am. J. Int'l L. Suppl. 455 (1932).

[154]U.N. International Law Commission, supra note 152.

[155]Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, arts. 20-23, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, 218-20, in force Sep. 10, 1964 [hereinafter cited as Territorial Sea Convention].

[156]U.N. International Law Commission, supra note 152.

[157]Territorial Sea Convention, supra note 155.

[158]U.N. Conference on the Law of the Sea, 3 Official Records, 221 annexes, U.N. Doc. A/CONF. 13/c.1/L.42 (1958).

[159]U.N. Doc. ST/LEG/3, Rev.1 (1962).

[160]U.N. Conference on the Law of the Sea, supra note 158, at 222 annexes. Under the Rumanian proposal, present art. 21 would have read:

> The rules contained in sub-sections A and B shall apply to government ships operated for commercial purposes without prejudice to the immunity enjoyed by such ships in matters of civil jurisdiction [italics added to denote the additional language proposed by Rumania].

[161]U.N. Doc. ST/LEG/3, Rev.1 (1962). The Soviet reservation, which is similar in effect to resrvations made by Bulgaria, Byelorussian S.S.R., Czechoslovakia, Hungary, Rumania, and Ukrainian S.S.R., states:

> Article 20: The Government . . . considers that government ships in foreign territorial waters have immunity and that measures mentioned in this article may therefore be applied to them only with the consent of the flag state.

[162]516 U.N.T.S. 282.

[163]J. Sweeney, supra note 1, at 42. Mc Dougal & Burke, supra note 8, at 151, state that only nine states voted against art. 21 in plenary session.

[164]Fensterwald, United States Policies Toward State Trading, 24 Law & Contemp. Prob. 369, 387 (1959): such arrangements have been concluded by the U.S. with Italy, Japan, Ireland, Germany, Israel, Greece, Iran, the Netherlands, Republic of Korea, Denmark, Columbia, Nicaragua, Haiti, and Uraguay.

[165]Treaty of Friendship, Commerce and Navigation Between the United States of America and the Federal Republic of Germany, Oct. 29, 1954, art. XVIII, para. 2, [1955] 7 U.S.T. 1839, T.I.A.S. No. 3593.

[166]J. Sweeney, supra note 1, at 39-40.

[167]See Trowbridge, East-West Trade: An Avenue Toward World Peace, 56 Dep't State Bull. 881, 885 (1967).

[168]See generally Spulber, The Soviet Bloc Foreign Trade System, 24 Law & Contemp. Prob. 420-23 (1959).

[169]See American Assembly, supra note 6.

[170]Pp. 64-65 and notes 160, 161 supra.

[171]S. Sucharitkul, supra note 55, at 152.

[172](1918) SOV. UZAK. R.S.F.S.R., No. 23, Item 432; as quoted in Hazard, supra note 84, at 246.

[173]Pozdniakov, The State Monopoly of foreign Trade in the USSR, 5 Sov. Law & Gov't No. 3, 33, 38 (1967).

[174]Id.

[175]Id., at 36.

[176]Committee For Economic Development, supra note 16.

[177]Allen, supra note 13.

[178]Cf. Lauterpacht, supra note 3, at 224.

[179]Berman, The Legal Framework of Trade Between Planned and Market Economies: The Soviet-American Example, 24 Law & Contemp. Prob. 482, 485 (1959).

[180]S. Sucharitkul, supra note 55, at 152.

[181]Pozdniakov, supra note 173, at 36.

[182]SZ S.S.S.R. (1933) No. 59, Item 354 (Statute on Trade Representations and Trade Agencies of the U.S.S.R. Abroad), art. 1, 3 Sov. Stat. & Dec. No. 2-3, 21 [1967].

[183]Id., art. 4, at 23.

[184]Id., art. 3, at 22.

[185]Id., art. 4, at 23.

[186]Id.

[187]Id., art. 2, at 22.

[188]Pp. 31-32 and notes 96, 97 supra.

[189]S. Sucharitkul, supra note 55, at 157-61.

[190]United Kingdom-Soviet Agreement, supra note 93.

[191]Agreement Between the Union of Soviet Socialist Republics and the Federal Republic of Germany Concerning General Matters of Trade and Navigation, Apr. 25, 1958, art. 2, annex, 346 U.N.T.S. 71 [hereinafter cited as German-Soviet Agreement].

[192]Spulber, supra note 168, at 421-23.

[193]Pozdniakov, supra note 173, at 37.

[194]Spulber, supra note 168, at 422.

[195]Pozdniakov, supra note 173, at 37.

[196]Id., at 39.

[197]Berman, supra note 179, at 490.

[198]See J. Sweeney, supra note 1, at 54-55.

[199]Pozdniakov, supra note 173, at 39; p. 76 and note 189 supra.

[200]C. Schmitthoff, The Export Trade, 367 (1962).

[201]Id., at 367-69; see also Berman, supra note 179.

[202]German-Soviet Agreement, supra note 191, at art. 4, annex.

[203]The quoted phrase is taken slightly out of context from Pozdniakov, supra note 173, at 39; see Committee for Economic Development, supra note 16, at 11; Hazard, supra note 84, at 246.

[204]Allen, supra note 13, at 273-75.

[205]E.g., Export Control Act of 1949, 50 U.S.C. App. 2201, et seq. (1964).

[206]See generally, Steiner & Vaghts, supra note 42, at 113-17.

[207]The Tate Letter, supra note 5.

[208]Committee for Economic Development, supra note 16, at 17.

[209]See, e.g., U.S. Congress, Joint Economic Committee, supra note 101, at 946.

[210]Lauterpacht, supra note 3, at 227; Fensterwald, Sovereign Immunity and Soviet State Trading, 63 Harv. L. Rev. 614, 623 (1950).

[211]Notes 146 and 164 supra.

[212]Collins, supra note 128, at 148; Mc Dougal & Burke, supra note 8, at 155.

[213]Public Vessels Act, 46 U.S.C. 741-48, summarized in note 95 supra.

[214]Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1965), cert. denied 381 U.S. 934 (1965).

[215]Mc Dougal & Burke, supra note 8, at 139-42, 155.